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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS AND NEW YORK SHIPPING ASSOCIATION, INC.,
Petitioners,

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC., NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, CONSOLIDATED FORWARDERS INTERMODAL CORPORATION, AMERICAN IMPORTERS ASSOCIATION AND INTERNATIONAL ASSOCIATION OF NVOCCS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Questions Presented

This case presents for adjudication significant questions, never previously decided by this Court, relating to the reconciliation of the conflict between federal labor and shipping regimes—questions which Justice Marshall observed in an earlier companion case "present difficult and complex problems." *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490, 512 (1980). These questions are:

1. Whether national labor and shipping policies require that a collectively bargained work preservation provision in the maritime industry, which is governed by the specific prescriptions of federal labor law, should be accorded a labor exemption from federal shipping law?

2. Whether the inherent effect upon third parties of every work preservation provision—a factor which this Court has consistently held may not be considered in adjudging its legality under federal labor law—should nevertheless cause an automatic forfeiture of the labor exemption from federal shipping law?

Parties

All parties in the court of appeals appear in the caption. In accordance with Rule 28.1 of the Rules of this Court, it should be noted that corporate petitioner New York Shipping Association, Inc. has one subsidiary, Atlantic Cargo Inspection Corporation. The other petitioner, Council of North Atlantic Shipping Associations, is an unincorporated association which has no corporate parent or subsidiaries.

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FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC., NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, CONSOLIDATED FORWARDERS INTERMODAL CORPORATION, AMERICAN IMPORTERS ASSOCIATION AND INTERNATIONAL ASSOCIATION OF NVOCCS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Council of North Atlantic Shipping Associations ("CONASA") and New York Shipping Association, Inc. ("NYSA") pray that a writ of certiorari issue to review the judgment entered in this case on March 2, 1982 by the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinion of the court of appeals is reported officially at 672 F.2d 171.[1] A copy is reproduced as Appendix A in the separately bound appendix to this petition (App. A at 1a-47a).[2] The decision of the Federal Maritime Commission (App. B at 48a-60a) appears officially at 21 F.M.C. 1 (1978).[3] The Federal Maritime Commission ("FMC" or "Commission") adopted the initial decision of its administrative law judge (App. C at 61a-120a) which appears at 21 F.M.C. 7 (1975).[4]

Jurisdiction

The judgment of the court of appeals (App. D at 121a-122a) was entered on March 2, 1982. This petition is being filed within 90 days thereof. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

Statutes

The relevant statutes are Labor Management Relations Act ("LMRA") §§ 8(b)(4) and 8(e), 29 U.S.C. §§ 158(b)(4) and 158(e) (1976); Shipping Act §§ 14 Fourth, 16 First, and 18(a), 46 U.S.C. §§ 812 Fourth, 815 First, and 817(a) (1976); Intercoastal Shipping Act § 4, 46 U.S.C. § 845(a) (1976); and the Maritime Labor Agreements Act ("MLAA"), Pub. L. No. 96-325, 94 Stat. 1021 (Aug. 8,

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[1] It is also reported in 93 Lab. Cas (CCH) ¶ 13,286 and in 109 L.R.R.M. (BNA) 2896.

[2] References are to the pages of the separately bound appendix.

[3] It is also reported at 18 S.R.R. (P&F) 553 (FMC 1978).

[4] The initial decision is also reported at 16 S.R.R. (P&F) 315 (FMC 1975).

1980). The complete texts of these statutes are reproduced verbatim in the separately bound appendix (App. E at 123a-132a).

Statement of the Case

This case arises out of the implementation in 1973 of the Rules on Containers, the collectively bargained response to the technological displacement of longshore work occasioned by the increasing use of automated cargo handling techniques in the maritime industry. The relevant facts appear in the opinions of this Court and the District of Columbia Circuit in *NLRB* v. *International Longshoremen's Association ("ILA")*, 447 U.S. 490 (1980), *aff'g* 613 F.2d 890 (D.C. Cir. 1979). However, for the convenience of the Court, the more salient facts will be highlighted.

The Rules on Containers were forged during the turbulent history of a labor struggle that has raged in the shipping industry without interruption for the past 25 years (App. A at 1a-2a, 9a, 10a, 18a-19a; App. I at 188a-197a). Their emergence is a classic chronicle of a labor union's primal efforts to exact from its members' employers contractual protection for the job security of union members, who were faced with a drastic loss of work opportunities (App. A at 7a-8a; App. C at 82a; App. I at 184a-185a, 196a, 197a, 239a, 247a n.65). The focus of contention has been the industry's increasingly prevalent use of large metal cargo containers to increase the efficiency of shipping operations by radically decreasing the need for the traditional piece-by-piece loading and unloading of oceanborne cargo by longshoremen (App. A at 8a n.22; App. I at 202a). This technological advance, known as containerization, was conceived, nurtured and developed

by the shipping employers' investment of hundreds of millions of dollars (App. A at 4a; App. I at 190a, 224a).

From the advent of containerization in the late 1950's to the present, the longshoremen's union, the International Longshoremen's Association, AFL-CIO ("ILA"), and the shipping employers have disagreed about the use of containers (App. A at 9a-10a; App. C at 83a; App. I at 186a-187a). The employers through their collective bargaining representatives[5] have consistently taken the position that their containers should be permitted to move on and off the docks without restriction (App. A at 9a; App. C at 83a; App. I at 188a). Conversely, the ILA has strenuously resisted the use of containers (App. A at 9a; App. I at 188a-197a).[6]

After a decade of labor strife and a series of inadequate contractual solutions, the dispute reached a crucial juncture in the 1968 negotiations because of the introduction of the

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[5] Petitioners CONASA and NYSA are multi-employer associations in the longshore industry. CONASA represents constituent multi-employer associations in ports from Massachusetts to Virginia (App. A at 2a n.1; App. C at 80a). NYSA represents shipping employers in the Port of New York (App. A at 3a n.2). Since CONASA's formation in 1970, it has bargained with the ILA over certain key issues, including containerization, on a master contract basis (App. A at 9a n.25). Prior to the formation of CONASA, other ports on the Atlantic and Gulf coasts generally adopted the master terms of the labor agreement negotiated by NYSA in the Port of New York (App. A at 9a n.25). After NYSA's withdrawal from CONASA in 1977 both associations continued to participate jointly in master contract negotiations with the ILA.

[6] In 1964, the United States Department of Labor urged both management and labor to resolve their differences through collective bargaining. The Labor Department recommended that the parties be guided by the equitable principle that, while management may introduce new technology and improve manpower utilization, it has a concomitant obligation to assure a direct measure of job security for its work force.

first fully containerized vessel into the major North Atlantic trade (App. I at 247a n.64) and the published plans by many carrier employers to embark upon full container operations. The longshoremen's demand to load ("stuff") and unload ("strip") all containers was rejected (App. I at 190a). A strike then ensued for 57 days on the North Atlantic coast and for more than 100 days in other Atlantic and Gulf ports (App. A at 10a; App. I at 190a). The Presidential Board of Inquiry, established pursuant to the national emergency provisions of the Taft-Hartley Act, 29 U.S.C. § 171, *et seq.* (1976), identified containerization as the critical issue separating the parties (App. I at 191a).

Under unrelenting strike pressure, and with the assistance of a federal mediator appointed by the President of the United States, the carrier employers for their own survival and to maintain the flow of commerce reluctantly reached agreement with the ILA (App. A at 10a). The shipping industry recognized that the longshoremen had the right to demand and negotiate contract provisions preserving their work (App. A at 3a). Similarly, the dockworkers' union realized that it should not unreasonably impede technological progress, even though, as this Court has recognized, the union could have precluded all containerization. *ILA*, 447 U.S. at 510. The resulting collective bargaining agreement contained the Rules on Containers—essentially the same contractual provisions challenged in this case.[7]

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[7] Shortly after the Rules were formalized in the 1968 labor contract, their validity was upheld—first, under LMRA §§ 8(b)(4) and 8(e), 29 U.S.C. §§ 158(b)(4) and 158(e) (1976), by a Regional Director and General Counsel of the National Labor Relations Board, and then under the antitrust laws by the United States Court of Appeals for the Second Circuit. *See Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n ("ICTC")*, 426 F.2d 884 (2d Cir. 1970).

The Rules represented a compromise (App. A at 11a; App. C at 81a, 83a; App. I at 225a). The ILA permitted the overwhelming bulk, or more than 80% of the container traffic on the Atlantic and Gulf Coasts, consisting of full shipper's loads,[8] as well as all other containers which originate at or are destined to points 50 or more miles from a port, to pass over the piers intact (App. A at 11a; App. C at 81a; App. I at 192a, 225a). In exchange, the carrier employers agreed that any loading or unloading of their own containers with cargo from within the local 50 mile port area (other than FSL cargo) would continue to be performed by their own longshore employees at the piers (App. A at 11a-12a; App. C at 67a n.3; App. I at 177a-178a).[9] This basic compromise enabled containerization to flourish, producing a monumental increase in longshore work productivity (App. A at 5a n.11, 8a n.22).

Despite the contractual formality of the Rules,[10] the ILA continued to assert that the steamship carriers and other shipping employers were permitting, if not encouraging, violations of the labor contract, thus depriving longshoremen of their traditional work (App. A at 10a; App. I at

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[8] A full shipper's load ("FSL") is a full container load of goods beneficially owned by a single shipper or consignee which loads or unloads the container at its own place of business. *ILA*, 447 U.S. at 497.

[9] To induce on-pier performance of this work, the Rules provided that any export container loaded at a local off-pier facility within 50 miles of a port was to be stripped and its contents stuffed into a container at pierside (App. A at 11a; App. C at 67a). The converse applied to an import container; its contents would be stripped at the pier if it was to be unloaded at an off-pier facility within 50 miles (App. A at 11a). The traditional exemptions for mail, household goods and the personal effects of military personnel were retained (App. A at 12a).

[10] After another long strike of 56 days' duration, the 1971 labor contract, now negotiated by CONASA, left the 1968 Rules intact (App. I at 193a-194a).

194a). The ILA's principal complaint opposed the shipment of consolidated containers (loaded with the individual cargo lots of several shippers) since their contents had not been handled by longshoremen at the docks. Faced with the ILA strike threat to halt the movement of all containers if the Rules were not effectively enforced, the shipping employers in 1973 acceded to an amendment, known as the Dublin Supplement, which was designed to eliminate the violations cited by the ILA (App. A at 10a; App. C at 89a; App. I at 194a-195a).

The Dublin Supplement prohibited the steamship carrier employers from releasing their containers to off-pier consolidation facilities (App. A at 13a, 13a n.45; App. C at 89a; App. I at 195a).[11] The shipping employers were to advise the consolidation companies to deliver their loose cargo lots to the pier where they would be physically loaded in the first instance into the shipping employers' containers by their own longshore employees. Any import consolidated container was to be stripped at pierside and its contents picked up by the consolidator in uncontainerized form (App. C at 90a).

The basic principles in the 1968 and 1971 Rules and Dublin Supplement were retained in the 1974 Rules on Containers (App. I at 195a-196a). This litigation ensued when the Rules were embodied verbatim by a steamship carrier into its ocean tariff (App. A at 14a-15a). The FMC then initiated an investigation into the legality of the Rules under federal shipping law (App. A at 15a).[12]

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[11] Consolidation companies, or nonvessel operating common carriers, solicit shipments with volumes smaller than the capacity of a container from various shippers and arrange for its consolidation into containers (App. I at 218a-220a).

[12] The Rules have also been the subject of labor and antitrust litigation spanning the last decade. *See ILA*, 613 F.2d at 906-08.

(footnote continued on following page)

Decisions Below

The FMC[11]

The Commission refused to grant the nonstatutory labor exemption to the Rules on Containers (App. B at 54a-59a; App. C at 106a-118a; App. G at 145a-146a; App. H at 148a-149a). Its reasons for this denial are unclear. On the one hand, the Commission seemed to say that the labor exemption is available only to relieve labor contracts from the preimplementation approval requirements of Shipping Act § 15, 46 U.S.C. § 814 (Supp. IV 1980)—statutory procedures not involved in this case. This narrow view of the labor exemption rested upon the Commission's misreading (App. B at 57a-59a; App. C at 112a-113a) of this Court's earlier decisions in *Volkswagenwerk Aktiengesellschaft* v. *FMC ("Volkswagen")*, 390 U.S. 261 (1968) and *FMC* v. *Pacific Maritime Association ("PMA")*, 435 U.S. 40 (1978).

(footnote continued from preceding page)

Following this Court's remand in *ILA*, the National Labor Relations Board reconsidered all existing labor law litigation involving the Rules in a single consolidated proceeding. The Board is currently reviewing the recent initial decision of its Administrative Law Judge (App. I at 153a-367a) who, with certain limited exceptions not germane to this case, upheld the validity of the Rules on Containers under national labor law. *Int'l Longshoremen's Ass'n*, Nos. 2-CC-1364, *et al.* (NLRB Initial Decision Sept. 29, 1981). The related antitrust suits have been stayed awaiting the final outcome of this NLRB litigation. *See, e.g., Consolidated Express, Inc.* v. *New York Shipping Ass'n*, 641 F.2d 90 (3d Cir.), *mandamus and prohibition denied sub nom. In re Int'l Longshoremen's Ass'n*, 451 U.S. 905 (1981). Since February 24, 1981, implementation of the Rules on Containers has been enjoined under LMRA § 10(l), 29 U.S.C. § 160(l) (1976), pending the NLRB's final determination. *See Pascarell* v. *New York Shipping Ass'n*, No. 81-13 (D.N.J.), *aff'd*, 650 F.2d 19 (3d Cir.), *cert. denied*, 102 S. Ct. 130 (1981).

[11] Since the Commission's final decision expressly adopted the initial decision of its administrative law judge, both decisions will be addressed interchangeably.

On the other hand, the Commission seemed to foreclose the labor exemption to any labor contract that did not comport with the substantive prescriptions of the shipping statutes (App. B at 54a-55a; App. C at 107a-108a). In the Commission's parochial view, the legality of the collective bargaining agreement under national labor law "matters not at all." (App. C at 107a). Under this test, the labor exemption becomes no more than an ephemeral and meaningless label completely lacking in substance. The Commission would require that a labor contract first pass muster under shipping law standards to establish its right of exemption from these very same provisions. In essence then, the Commission merged the issues of shipping law exemption and shipping law liability, the practical effect of which is the demise of the labor exemption.[14]

The Court of Appeals

The court of appeals sustained denial of the exemption for reasons not articulated in the FMC's tenebrious decision.[15] The court's principal basis for denial of the exemption was that "[t]he Rules on Containers, as incorporated into the . . . tariff, directly impose terms on third parties."

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[14] The questions of exemption and liability are separate and distinct issues. *PMA*, 435 U.S. at 61. The issue whether the Rules violate the shipping laws is to be held in reserve and only reached after the question of exemption has been resolved. *Cf.*, *Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 693 (1965).

[15] Although the court of appeals concluded that the subsequently enacted statutory labor exemption in the MLAA (App. E at 123a-126a) "has no bearing on the FMC's jurisdiction over the Rules on Containers" in this case (App. A at 26a), it did, however, address this statutory exemption (App. A at 22a-26a). Its ultimate denial of the nonstatutory exemption seems to have been influenced by its interpretation of the MLAA. Accordingly, the labor exemption, which petitioners urge this Court to review, requires consideration of both statutory and nonstatutory factors.

(App. A at 37a).[16] The court of appeals purported to employ the test fashioned by this Court in *PMA* (labor exemption from shipping laws) and in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965) (labor exemption from antitrust laws). However, the court of appeals converted the *PMA-Pennington* intentional "imposition" test into a pure "effects" test. In the view of the court of appeals, any effect on persons outside of the bargaining unit automatically amounts to an "imposition of terms" fatal to the exemption. Since every work preservation agreement must necessarily have effects upon third parties, the decision of the court of appeals obliterates the doctrine of labor exemption for work preservation agreements.

Reasons for Granting the Writ

1. *Substantial Questions of National Scope and Importance*

This Court has already recognized that the questions of federal law in this case "present difficult and complex problems." *ILA*, 447 U.S. at 512. The court of appeals shared these sentiments. It is readily apparent from the breadth of its opinion that the court of appeals considered the intertwined federal labor, antitrust and shipping questions substantial and significant.

The decision in this case has nationwide ramifications. It has an immediate practical effect upon the labor relations of the vital longshore industry.[17] Its legal implica-

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[16] The majority of the court of appeals opined, contrary to the Commission's suggestion, that *PMA* does not limit the labor exemption to § 15 preimplementation approval (App. A at 35a-36a n.126). Circuit Judge MacKinnon (dissenting in part) disagreed (App. A at 40a-46a). Nonetheless, the majority declined to decide this question (App. A at 36a n.126).

[17] The ILA has voiced its indignation at the FMC's intrusion into its collective bargaining rights. It stands poised to reopen

(footnote continued on following page)

ions, however, extend to every labor contract in the shipping industry throughout the United States. The national labor law rights of every maritime worker are at peril.

If the decision of the court of appeals in this case is allowed to stand, the doctrines of labor exemption and work preservation are virtually annulled. *See* Handler and Zifchak, *Collective Bargaining And The Antitrust Laws: The Emasculation Of The Labor Exemption*, 81 Col. L. Rev. 459 (1981). The effects test fashioned by the court of appeals is not limited to the labor exemption from the shipping laws. It necessarily extends to the labor/antitrust exemption and the work preservation doctrine as well. The resolution of the questions presented in this case, therefore, will affect business and labor in every sector of the national economy.

2. *Conflict With Decisions of Other Circuits*

The District of Columbia Circuit's resolution of the issue whether the collectively bargained Rules are entitled to the protection of the labor exemption irreconcilably conflicts with the earlier decisions of the Second Circuit in *ICTC, supra* note 7, and the Third Circuit in *Consolidated Express, Inc.* v. *New York Shipping Association ("Conex")*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded*, 448 U.S. 901 (1980).

The Second Circuit in *ICTC* held that essentially the same labor provisions at issue here were entitled to the labor exemption from the antitrust laws. The Third Circuit in *Conex* rejected the notion embraced by the court

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the national master contract which was quickly and peacefully negotiated following this Court's *ILA* decision. The labor strife which beset the industry for more than two decades is bound to resume. *See* Solicitor General's Pet. for Cert. at 17, *ILA*.

of appeals in this case that the effect upon third persons of the same labor provisions at issue here is a determinative consideration that removes the protection of the labor exemption. *Conex*, 602 F.2d at 515.

The District of Columbia Circuit refused to acknowledge the conflict. It facilely invoked this Court's observation that the labor/shipping exemption "is not always exactly congruent" with its labor/antitrust counterpart. *PMA*, 435 U.S. at 63. The court of appeals, however, failed to realize that its denial of the labor exemption rested upon a factor common to both exemptions—the deliberate "imposition of terms" test. *Compare PMA*, 435 U.S. at 62 (shipping) *with Pennington*, 381 U.S. at 665-61 (antitrust). The District of Columbia Circuit's transformation of the *PMA/Pennington* standard into an "effects" test thus pervades the entire labor exemption doctrine; it is not restricted to the shipping law exemption. The conflict with *ICTC* and *Conex* is real and perduring.

3. *Recurring Uncertainty Concerning the Labor Exemption*

The court of appeals decision in this case is important not only because it gives rise to an intercircuit conflict, but also because the issue on which the circuits disagree is a significant one which this Court has never addressed. Neither *Volkswagen* nor *PMA* defined the appropriate contours of the labor/shipping exemption for collective bargaining agreements, although Justice Harlan, concurring in *Volkswagen*, 390 U.S. at 282-91, Justice Douglas, dissenting in *Volkswagen*, *id.* at 295-316, and Justice White, writing for the majority in *PMA*, 435 U.S. at 140-64, discussed it at length. It is suggested by the court of appeals that *PMA* and *Pennington* adopted an effects standard. At no time, however, has this Court ever included

in the labor exemption equation in either the labor/shipping or labor/antitrust contexts any factor which would automatically remove the exemption because of the effects of the labor contract upon third parties.

This perversion of the *PMA/Pennington* test has far-reaching implications since it subverts the fundamental principle of the work preservation doctrine that the inherent effect of a work preservation agreement upon third parties, "no matter how severe, is of course irrelevant to the validity of the agreement." *ILA*, 447 U.S. at 507 n.22; *accord, National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 627 (1968). This undermining of established labor law principles is not obviated by labelling it "a separate issue under the labor laws,"—an expedient adopted by the court of appeals in this case (App. A at 38a n.136). The court of appeals may not so cavalierly abdicate its judicial responsibility to reconcile national labor law "with the sometimes competing policies of federal laws promoting and regulating competition, viz., the antitrust laws and in the case of maritime labor relations, the Shipping Act." *Volkswagen*, 390 U.S. at 284 (Harlan, J. concurring); *see also Allen Bradley Co.* v. *Local 3, IBEW*, 325 U.S. 797, 806 (1945).

If the effects tests fashioned by the court of appeals in this case were to prevail, it would have a devastating impact upon collective bargaining. Disputes over job security would be insoluble. Work preservation provisions, valid under federal labor law, would nonetheless be subject to governmental invalidation under shipping and antitrust regulatory schemes having different objectives and policies. These contractual accords would no longer be viable alternatives at the bargaining table because of the reluctance of negotiators to reach an agreement that might expose them not only to the sanctions of the shipping laws

but to treble damage liability under the antitrust laws.[18] The national labor policy of encouraging the peaceful resolution of labor disputes through collective bargaining would be thwarted by this unduly onerous regime of multiple federal regulation.

This case provides an opportunity for this Court to (1) review issues it has not yet addressed, (2) reconcile the conflicting interpretations by the lower courts of its prior decisions in *Pennington*, *PMA*, *ILA* and *National Woodwork*, and (3) accommodate the overlapping labor, antitrust and shipping policies by formulating an appropriate and concrete labor exemption test.

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[18] Union unwillingness to surrender its work preservation agreements, on the other hand, will subject employers to the effects of economic strike pressure which would not be enjoinable because of the prohibitions of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* (1976). *See Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 637 n.19 (1975); *Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330, 339 n.15 (1960).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
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Respectfully submitted,

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APPENDIX

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Petitioners,

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC., NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, CONSOLIDATED FORWARDERS INTERMODAL CORPORATION, AMERICAN IMPORTERS ASSOCIATION AND INTERNATIONAL ASSOCIATION OF NVOCCS,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

Opinion of the United States Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1776

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS and NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents,

NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC., *et al.*, INTERNATIONAL ASSOCIATION OF NVOCCS, and AMERICAN IMPORTERS ASSOCIATION, INC.,

Intervenors.

Petition for Review of an Order of the Federal Maritime Commission

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Argued September 30, 1981 Decided March 2, 1982

Constantine P. Lambos, with whom *Donato Caruso* and *Francis A. Scanlan* were on the brief, for petitioners.

[2] *Gordon M. Shaw,* Attorney, Federal Maritime Commission with whom *Sanford M. Litvack,* Assistant Attorney

General, Department of Justice, *Edward G. Gruis,* Deputy General Counsel, Federal Maritime Commission, and *John J. Powers, III* and *Robert J. Wiggers,* Attorneys, Department of Justice, were on the brief, for respondents.

Gerald H. Ullman for intervenors National Customs Brokers and Forwarders Association of America, Inc., *et al.*

Raymond P. deMember was on the brief for intervenor International Association of NVOCCs.

Samuel Frankel was on the brief for intervenor American Importers Association, Inc.

Before WRIGHT, MACKINNON, and WALD, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* WRIGHT.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* MACKINNON.

WRIGHT, *Circuit Judge:* This case marks yet another chapter in the lengthy, difficult, and bitterly contested process of technological change in the maritime industry. The development of container technology—often described as the "container revolution"—created the potential for drastic reductions in the utilization of labor on the docks. For more than 20 years containerization has been one of the central issues in collective bargaining between the steamship and stevedoring companies, represented by the Council of North Atlantic Shipping Associations (CONASA)[1] and the New York Shipping Association

[1] CONASA is a multi-employer collective bargaining association whose constituent members are shipping employers' associations in

[3] (NYSA),[2] and the maritime workers, represented by the International Longshoremen's Association (ILA).[3]

After protracted negotiations punctuated by strikes and labor unrest, the employers and the ILA accepted a compromise, the Rules on Containers, which seek to preserve a portion of the longshoremen's traditional work jurisdiction while permitting containerization of a substantial proportion of cargo traffic. The National Labor Relations Board (NLRB) is currently evaluating the legality of these rules under the federal laws governing labor-management relations.[4] The Rules on Containers, however, also affect the interests of another group—the customers of the shipping lines—who are protected by the federal shipping laws from unjust, unreasonable, and discriminatory rates and practices.[5] In 1978 the Federal

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the ports of Boston, Providence, Philadelphia, Baltimore, and Hampton Roads. Petitioners' brief at i; Joint Appendix (JA) 698a-699a.

[2] NYSA is a multi-employer collective bargaining association of the shipping employers in the Port of Greater New York. NYSA participated in the underlying administrative proceedings before the Federal Maritime Commission (FMC) as a member of CONASA. In 1977 NYSA withdrew from CONASA; it has joined with CONASA in a joint petition for review. Petitioners' brief at ii.

[3] The ILA is not a party to this case.

[4] 29 U.S.C. §§ 158(b)(4)(B), 158(e) (1976) (§§ 8(b)(4)(B) and 8(e) of the National Labor Relations Act). *See NLRB v. Interna'l Longshoremen's Ass'n*, 447 U.S. 490 (1980); *Internat'l Longshoremen's Ass'n*, Nos. 2-CC-1364 *et al.* (NLRB Initial Decision, Sept. 29, 1981) (decision by Administrative Law Judge (ALJ) on remand) (hereinafter cited as "NLRB Initial Decision"); discussion in Part II-A *infra*.

[5] 46 U.S.C. §§ 812 Fourth, 815 First, 817(a), 845(a) (1976).

Maritime Commission (FMC) determined that the Rules on Containers violate the shipping laws.[6]

Petitioners CONASA and NYSA, associations of shipping employers, contend that the Rules are outside the [4] jurisdiction of the FMC because collective bargaining agreements regarding work preservation are exempt from regulations under the shipping laws. We cannot agree. Under controlling principles adopted by the Supreme Court, the FMC has jurisdiction to determine the legality of the Rules on Containers. However, we remand to the FMC for reconsideration of its decision on the merits in light of intervening judicial decisions.

I. Background

The development of container technology has had a momentous impact on the loading and unloading of ocean-borne cargo. New pressures, perils, and opportunities have faced longshoremen, steamship lines, stevedoring companies,[7] shipping customers, freight forwarders, customs brokers, and other groups. Not only have changes in the quantity and types of work on the docks profoundly affected labor-management relations; the new technology has also given rise to new patterns of shipping traffic.

A. *The History of Containerization*

Before the advent of container shipment, boxes, crates, packages, and other cargo were generally transported to

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[6] Report and Order Adopting Initial Decision, June 14, 1978, JA 103a-116a, 21 FMC 1 (1978).

[7] Longshoremen and other maritime workers are employed either by steamship companies or by stevedoring companies and terminal operators who provide loading and unloading services under contract to steamship companies. *See* JA 626a-628a.

the docks in loose, "breakbulk" form. Longshoremen checked and sorted the cargo, placed it on pallets, and loaded each pallet into the hold of a ship. When the vessel arrived at its destination port, longshoremen unloaded the hold and sorted the individual shipments for pickup or storage.[8] Larger boxes, consolidating several packages or crates, were occasionally used in ocean [5] freight but formed an insignificant proportion of cargo traffic.[9]

Beginning in the late 1950's in the trade between the Atlantic coast and the Gulf coast and between the Atlantic coast and Puerto Rico,[10] steamship lines began to use containers—large reusable metal receptacles ranging in length from 20 to 40 feet—which could be moved to and from a ship as a single unit.[11] These containers were

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[8] JA 144a-146a, 587a-589a, 710a-713a, 1327a-1330a, 1351a.

[9] NLRB Initial Decision, *supra* note 4, at 17 n.21. Traditionally, consolidated boxes of household goods owned by persons changing places of residence, personal effects of military personnel, and United States mail were not handled by longshoremen at the piers. JA 714a-715a.

[10] JA 499a, 596a-597a, 1097a, 1280a-1281a, 1284a-1285a. Containerization was introduced significantly later on other routes. Apparently in Baltimore and Hampton Roads it was initiated in 1965 and 1966 but did not have a substantial impact on work patterns until the late 1960's and early 1970's. *Internat'l Longshoremen's Ass'n v. NLRB*, 613 F.2d 890, 894 (D.C. Cir. 1979), *aff'd*, 447 U.S. 490 (1980); NLRB Initial Decision, *supra* note 4, at 17 n.22. Even in the Port of New York, where container shipping was introduced during the late 1950's, it did not assume substantial proportions until the late 1960's. *See* note 23 *infra*.

[11] A container ship can be loaded or unloaded in a fraction of the time required for a conventional ship. As a result the in-port time of each ship is reduced and a given volume of cargo can be carried in a smaller number of ships. *NLRB v. Internat'l Longshoremen's Ass'n*, *supra* note 4, 447 U.S. at 495.

sometimes loaded ("stuffed") with breakbulk cargo and unloaded ("stripped") at the pier by longshoremen.[12] But containers could also be transported by truck or rail to inland terminals for stuffing, thereby reducing dockside congestion, labor costs, and paper work.[13] Steamship companies began to supply empty containers to shippers [6] for off-pier loading and to charge a lower rate for a fully-loaded container than for an equivalent amount of breakbulk cargo.[14]

Large-scale manufacturers and distributors could directly take advantage of the lower rates for containers by filling containers entirely with their own goods, either at their own facilities or at public warehouses. These containers were known in the trade as "full shippers' loads" or, if stuffed at a manufacturer's own facility by its own employees, as "manufacturer's label." In the early 1960's entrepreneurs began to offer some of the benefits of container shipping to small shippers whose cargo volume was not great enough to fill an entire container. Consolidators, also described as "non-vessel operating common carriers"

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[12] JA 1282a, 1287a-1290a, 1348a.

[13] JA 121a-122a, 232a, 283a-284a, 530a-531a, 1023a-1024a, 1085a, 1154a-1155a, 1158a, 1163a-1164a, 1295a-1297a.

[14] Freight rates for "less than containerload" (LCL) shipments vary from commodity to commodity. A uniform "freight-all-kinds" (FAK) rate is charged for containerloads consolidated away from the pier. The FAK rate is considerably lower than the LCL rate for any commodity. JA 1029a, 1257a-1260a; *cf.* JA 195a.

Several witnesses testified before the FMC that some steamship lines welcomed and even actively encouraged the development of non-vessel operating (NVO) carriers to handle LCL traffic. JA 256a-260a, 263a-264a, 1031a-1032a, 1163a-1165a, 1413a.

(NVOCC's or NVO's),[15] combined the goods of various shippers into a single container obtained from a steamship company and then delivered the container to the pier. The shipment, under a single bill of lading in the consolidator's name, was eligible for the reduced container rate. The consolidator could charge his shipping customers slightly less than the steamship package rate, thus attracting business while [7] making a profit.[16] NVO's offered shorter delivery times,[17] a single bill of lading, reduced export packaging expenses, better tracing, reduced risks of loss, damage, and pilferage at dockside,[18] and specialized services not provided by the steamship lines.[19] Many NVO's experienced dramatic growth in traffic volume and revenues during the 1960's.[20]

The increasing use of containers on conventional ships and on specially fitted container ships greatly reduced the

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[15] Typically a consolidating company owns no trucks or terminal facilities and employs no truck drivers; it leases services and facilities from other firms. Its small workforce is primarily managerial and clerical. JA 260a-261a, 271a-272a, 1217a; NLRB Initial Decision, *supra* note 4, at 38.

[16] JA 1029a, 1035a-1037a, 1360a-1361a, 1410a-1411a.

[17] NVO's could offer quicker delivery than a steamship company by choosing the earliest sailing from the schedules of several carriers, JA 1022a, 1292a, and by planning loads for direct delivery at the destination, JA 1293a.

[18] JA 482a-486a, 1030a, 1037a, 1144a, 1292a-1294a.

[19] NVO's offered various special services not offered by the steamship lines, including prepaid, collect, or C.O.D. shipments, paid pickup service, storage in transit, advance of inland freight charges, and consolidation or deconsolidation of various shipments belonging to a single customer but arriving from different sources or consigned to various destinations. JA 1022a-1023a, 1030a, 1293a-1294a, 1477a.

[20] JA 260a, 1021a, 1209a, 1298a-1299a.

role of longshoremen in handling cargo. A full container, capable of carrying 30,000 pounds of freight, can be transported by truck or rail directly to and from the pier and can be hoisted on and off the vessel by crane, without any tallying, sorting, palletization, loading, or unloading of individual packages by longshoremen.[21] Productivity per man-hour has increased markedly[22]; as a result the need for labor on the piers has drastically declined. In the [8] Port of Greater New York in 1968, immediately before the onset of large-scale containerization,[23] 23,500 registered longshoremen worked nearly 400 million man-hours. By 1975 fewer than 14,000 registered longshoremen worked less than 25 million man-hours.[24]

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[21] JA 766a-777a.

[22] JA 715a (in Port of New York productivity averaged .3 ton per man-hour in 1958, .8 ton per man-hour in 1974); NLRB Initial Decision, *supra* note 4, at 21-22 n.7 (productivity is .5 ton per man-hour on a breakbulk vessel and 2.54 tons per man-hour on a fully automated container ship).

[23] Until 1968, several witnesses testified, container traffic was a relatively small part of the cargo in the Port of New York. JA 498a-499a, 563a, 619a. In 1966 containers accounted for 3% of general cargo, *NLRB v. Internat'l Longshoremen's Ass'n*, *supra* note 4, 447 U.S. at 497, and approximately 20% of all cargo, NLRB Initial Decision, *supra* note 4, at 19. Most of the containers were used in the Puerto Rican trade, but in 1967 Sea-Land Service, Inc. introduced the first fully containerized vessel in the North Atlantic trade. Other steamship companies followed suit. *Id.* By 1974, 70% of the cargo tonnage passing through the Port of New York was containerized. *Id.* at 23-24.

[24] JA 619a, 751a, 1501a-1503a. Over a longer period the decline in the number of registered longshoremen in the Port of New York is in large measure attributable to the Waterfront Commission's program of "decasualization"—deregistration of surplus labor. JA 496a-499a. Registration dropped from approximately 41,000 in 1954 to approximately 23,500 in 1968. JA 751a. The president of CONASA testified that decasualization had been accomplished prior to 1968. JA 619a.

Appendix A—Opinion of the United States Court of Appeals for the District of Columbia Circuit

From the outset the International Longshoremen's Association strongly resisted the loss of jobs and members resulting from adoption of containerization. In every set of collective bargaining negotiations from 1957 to the present, including sessions in 1959, 1962, 1964, 1968, 1971, and 1974, containerization was the overriding issue.[25] The [9] ILA consistently sought to preserve its traditional work jurisdiction and to share in the economic benefits of labor-saving technology; the steamship companies with equal persistence sought maximum flexibility to use containers and increase productivity.[26] Under the pressure of actual and threatened work stoppages,[27] the two sides reached a succession of unstable agreements that partially restricted the use of containers. In the 1959, 1962, and 1964 agreements ambiguous wording allowed "unrestricted" movement of containers but also recognized the ILA's jurisdiction over stuffing and stripping within the general port area; the ILA received a royalty payment for each container.[28]

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[25] *See generally* JA 718a-720a. From 1956 until the formation of CONASA in 1970, North Atlantic ports generally adopted the master terms of the labor agreement for the Port of New York. JA 700a-701a; NLRB Initial Decision, *supra* note 4, at 17 n.23. After its establishment CONASA negotiated terms and conditions on wages, hours, welfare, benefits, containerization, and several other major issues, leaving local terms and conditions for resolution in individual ports. JA 700a-701a.

[26] JA 555a-557a, 576a, 596a, 718a-719a, 723a-728a, 1506a-1508a.

[27] Strikes occurred in 1962, 1964, 1968, and 1971; in addition, the ILA on several other occasions refused to handle certain categories of containers. *See generally* JA 720a-738a, 532a-533a.

[28] 1959 agreement, § 8, JA 752a-1; Containerization Arbitration Award, November 21, 1960, JA 753a-783a (establishing rates of royalty payments); discussion of 1962 agreement, JA 722a-723a; 1964 general cargo agreement, Part XII, JA 918a-919a. A system

Although the steamship companies continued to move some consolidated containers across the piers without ILA handling, the ILA asserted the right to stuff or strip such containers at the pier.[29]

A bitter and lengthy strike in 1968, lasting for 57 days in the Port of New York and more than 100 days on the Gulf coast, resulted in presidential mediation[30] and eventually in a more detailed and comprehensive agreement on the utilization of containers. The basic requirements of the present-day Rules were adopted in 1969,[31] but the union [10] continued to complain about lax enforcement and unchecked container movement in violation of the collectively-bargained Rules.[32] Faced by the ILA's threat to abrogate the compromise, the employers agreed in the early 1970's to more rigid provisions to enforce the Rules,[33] culminating in 1973 in the "Dublin Supplement." [34]

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of guaranteed annual income for ILA longshoremen was agreed upon in the aftermath of the 1964 strike and instituted in 1966. JA 501a.

[29] JA 720a-726a, 788a-840a, 924a-935a, 1355a-1356a.

[30] JA 726a-730a, 843a-848a.

[31] JA 849a-855a. *See* Part I-B *infra* (discussion of Rules).

[32] JA 731a-738a, 856a-871a, 890a-895a.

[33] JA 731a-738a, 856a-871a. Rule 3(h) of the Rules then in effect permitted the ILA to terminate the Rules if they failed to serve the purpose of protecting longshoremen's work jurisdiction. JA 854a (1968 agreement); JA 877a (1971 agreement).

[34] JA 900a-905a. In April 1975 the ILA unilaterally suspended the Rules and began to strip all containers from within 50 miles of ILA ports, with the exception of those loaded by manufacturers at their own facilities. JA 398a, 532a-533a. Later the parties resolved their differences and reinstituted the Rules with modifications imposing further restrictions on containers. *See* JA 1529a-1532a (Rules on Containers "as clarified and reinstated by Supplemental Agreement of May 30, 1975").

B. *The Rules on Containers*

The Rules on Containers represent "a reasoned response to the difficult problem of technological innovation," as this court has recognized in the labor-management context.[35] Qualified by detailed definitions, exceptions, and enforcement provisions, the Rules[36] generally require that containers owned, leased, or used by steamship companies, [11] if they originate within or are destined to a point within 50 miles of the center of any ILA port, must be stuffed and stripped by ILA deepsea labor on the pier, not by other employees at inland terminals. According to rough estimates by CONASA officials, the Rules permit 80 percent of container traffic to pass across the pier without rehandling by ILA labor; the remaining 20 percent remains within the work jurisdiction of the longshoremen's union.[37]

Within the 50-mile radius[38] the Rules require that all shipments, with three major exceptions, be stuffed and stripped at the pier rather than at inland terminals.[39]

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[35] *Internat'l Longshoremen's Ass'n* v. *NLRB*, *supra* note 10, 613 F.2d at 914 (review of NLRB proceeding regarding Rules).

[36] Part I-B of this opinion discusses the post-1975 version of the Rules on Containers, JA 1529a-1532a. After the Dublin Supplement and the 1975 Supplemental Agreement, the terms of the Rules remained basically unchanged. For a detailed discussion of the evolution of the Rules up to 1975, *see Internat'l Longshoremen's Ass'n* v. *NLRB*, *supra* note 10, 613 F.2d at 894-898; NLRB Initial Decision, *supra* note 4, at 19-23.

[37] JA 621a, 654a-655a.

[38] Some testimony in the record indicates that no point on the Atlantic or Gulf coasts is beyond the 50-mile radius of an ILA port. JA 634a-635a.

[39] The Rules do not apply to export containers, whether consolidated or full shipper's loads, that originate beyond the 50-mile port area, or to import containers destined to consignees beyond the 50-mile zone. Rules 2-A-(1), 2-B-(1), JA 1530a.

First, containers whose contents are owned by a single beneficial owner, including a manufacturer, and which are loaded or unloaded at the shipper's own facility by its own employees, need not be handled at the pier.[40] Second, import containers need not be stripped at the pier if they are actually stored at regular rates at a bona fide public warehouse for 30 days prior to distribution.[41] [12] Third, containers of mail, household goods of persons changing residences, and personal effects of military personnel are exempt from stripping and stuffing regardless of their place of origin or destination.[42] "The main remaining containerloads which the ILA now insists on stuffing and stripping at the piers," the FMC's Administrative Law Judge (ALJ) has written, "are containers coming to and from NVOCCs, consolidators, forwarders, deconsolidators, and other shippers and consignees who do not use their own employees to load and unload their containers, where the containers come to or go from points within 50 miles of a port." [43]

Over the course of more than a decade of negotiations, stiff enforcement provisions have been added to the Rules. Shippers must provide detailed documentation to enable

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[40] Rules 2-A-(2-(3), 2-B-(2), JA 1530a. Even if a load is owned by a single shipper or consignee, however, it may not be loaded or unloaded within the 50-mile zone by persons other than the owner's employees or at any place other than the owner's facility. The Rules are violated if a full shipper's load is handled by the employees of a public warehouse or a motor carrier line, even for the motor carrier's own convenience. *See Internat'l Longshoremen's Ass'n* v. *NLRB*, *supra* note 10, 613 F.2d at 895; NLRB Initial Decision, *supra* note 4, at 43-47.

[41] Rule 2-B-(4), JA 1530a.

[42] Rules 2-A-(4), 2-B-(3), JA 1530a.

[43] JA 51a.

the shipping line to determine whether the container is subject to stuffing or stripping at the pier.[44] In addition, the shipping companies must not provide containers to consolidators, distributors, or any other persons operating in violation of the Rules.[45] If a consolidated container arrives at the pier, it must be stripped and restuffed into a different container before it may be loaded aboard ship.[46] If the violation is discovered after the container has been loaded, the steamship company must pay $1,000 in liquidated damages per container into the royalty fund.[47] A joint labor-management committee interprets [13] the Rules and determines infractions with the assistance of a team of container investigators.[48]

The Rules on Containers impose burdens on importers, exporters, consolidators, distributors, and others within the 50-mile zone. If containers could move freely across the pier without ILA handling, regardless of the identity of the shipper, the place of origin, or the destination, then small shippers within the 50-mile zone could take full advantage of the benefits of container shipping. In contrast, the stuffing and stripping requirements allegedly increase shipping delays and labor costs, augment the risk of loss,

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[44] Rule 9(b), JA 1531a; JA 1397a-1398a (specific documentation requirements).

[45] Rule 1(e), JA 1529a (1975 amended agreement); Interpretation 1.6-2, JA 904a (Dublin Supplement).

[46] Rule 1(e), JA 1529a (1975 amended agreement); Interpretation 1.6-1(a), JA 904a (Dublin Supplement). This provision seeks to deter off-pier stuffing rather than to require duplicate handling.

[47] Rule 7(c), JA 1531a.

[48] Rule 9(a), JA 1531a; JA 206a-209a, 341a-348a, 392a-396a, 704a-705a, 938a-1016a (records of complaints, investigations, audits, and penalties).

pilferage, and damage in transit due to improper stowage, and deprive the shippers of the special services provided by consolidators.[49] NVO's and distributors previously operating within the 50-mile zone have been severely affected and in some cases have been forced to cease operations.[50]

On the other hand, the 50-mile rule and the enforcement provisions of the Dublin Supplement have averted further reductions of employment opportunities for ILA [14] longshoremen[51] and have reduced labor-management strife on the waterfront. Petitioners warn that if the Rules are set aside, the longshoremen may renew their demand for stripping and stuffing of all containers, not only those subject to the 50-mile rule. "Economic warfare would be the inevitable result," petitioners contend.[52]

C. *Federal Maritime Commission Proceedings*

This case involves the provisions of the Rules on Containers as incorporated by the Puerto Rico Maritime

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[49] JA 250a-251a, 315a-318a, 435a-438a, 486a, 1119a, 1124a, 1142a-1143a, 1263a, 1419a, 1431a-1432a, 1445a-1448a, 1480a. *See* note 19 *supra* (special services provided by consolidators). *But see* JA 412a-415a, 545a-549a, 649a-650a (testimony that risk of pilferage is not greater at dockside than elsewhere).

Several shippers and consolidators testified that, because NVO's have the incentive and expertise to stuff the maximum amount into each container without damage, in contrast with longshoremen, restuffing at the pier may result in improperly loaded cargo or in overflow cargo which is not placed in the same container. JA 430a, 438a-440a, 471a, 1406a-1407a.

[50] JA 434a, 436a, 466a-467a, 1045a-1047a, 1143a-1144a, 1419a, 1520a; *cf.* JA 1459a-1464a (wholesale exporter).

[51] CONASA estimated in 1974 that the work of loading and unloading consolidated containers generated jobs for approximately 3,000 employees in the Port of Greater New York alone. JA 741a.

[52] Petitioners' reply brief at 15-16.

Steamship Authority (PRMSA) into its ocean tariff—the contract of shipment it offers to shipping customers.[53] PRMSA, a quasi-governmental instrumentality of the Commonwealth of Puerto Rico, was created in 1974 to take over the steamship operations of several privately owned lines operating between Puerto Rico and the eastern United States.[54] Two of these lines—Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc.—had included the Rules in their filed tariffs, along with additional provisions passing the liquidated damages and extra handling costs on to shippers in some instances. The FMC had begun an investigation of the legality of these provisions.[55] After the establishment of PRMSA the FMC initiated an investigation of the PRMSA tariff and consolidated the two proceedings.[56] The orders of investigation alleged [15] pos-

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[53] JA 1380a-1396a.

[54] Petitioners' brief at 8 n.11.

[55] Order of Investigation and Suspension, Docket No. 73-17, April 13, 1973, JA 1a-7a.

[56] Order of Investigation and Suspension, Docket No. 74-40, September 13, 1974, JA 21a-26a. The FMC lifted its suspension of the tariffs at issue on September 23, 1974, JA 27a-28a, because it found that continued suspension of the Rules on Containers would "not be in the public interest." The tariffs therefore became effective, except that their application to two consolidation companies was barred by federal court injunction under the National Labor Relations Act pending final NLRB decision. *Balicer* v. *Internat'l Longshoremen's Ass'n*, 364 F.Supp. 205 (D. N.J.), *aff'd mem.*, 491 F.2d 748, 750 (3d Cir. 1973) (Consolidated Express); *Balicer* v. *Internat'l Longshoremen's Ass'n*, 73 Civ. 1811 (D. N.J. April 19, 1974) (Twin Express). The NLRB subsequently held the Rules to be illegal. *Internat'l Longshoremen's Ass'n*, 221 NLRB 956 (1975), *aff'd*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977). *But see* discussion in Part II-A *infra* (rejection of NLRB position in Supreme Court review of another proceeding). With respect to all other companies, the Rules on Containers appear to

sible violations of several sections of the federal shipping laws imposing obligations on common carriers: Section 14 Fourth of the Shipping Act of 1916, which prohibits unfair treatment of or unjust discrimination against any shipper with regard to cargo space accommodations[57]; Section 16 First of the Shipping Act of 1916, which makes it illegal to subject any person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage[58]; and Section 18(a) of the Shipping Act of 1916 and Section 4 of the Intercoastal Shipping Act of 1933, both of which require tariffs, rules, and regulations to be just and reasonable.[59]

[16] On October 9, 1975, the Administrative Law Judge (ALJ) issued an Initial Decision.[60] He rejected CONASA's contention that the FMC lacked jurisdiction over the Rules on Containers because of their origin in a collective bargaining agreement.[61] He also ruled that the tariff provisions violated the common carrier obligations imposed on PRMSA by the shipping laws. Under the Rules, he noted,

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have been in effect between 1974 and 1981. On February 24, 1981, however, a federal district court issued an injunction restraining enforcement of the Rules in all Atlantic and Gulf coast ports pending resolution of the NLRB proceeding on remand from the Supreme Court. *Pascarell* v. *New York Shipping Ass'n*, No. 81-13 (D. N.J.), *aff'd*, 650 F.2d 19 (3d Cir. 1981), *cert. denied*, —— U.S. ——, 50 U.S.L.W. 3246 (Oct. 5, 1981). The Court of Appeals, relying on the *Balicer* cases, erroneously assumed that the Rules were "never operative" from 1973 to 1981.

[57] 46 U.S.C. § 812 Fourth (1976).

[58] *Id.* § 815 First.

[59] *Id.* §§ 817(a), 845(a).

[60] JA 32a-81a.

[61] JA 70a-78a.

an export shipper within the 50-mile zone who loads a full container at his own facility obtains more favorable treatment than either a shipper whose full container is loaded at a public warehouse or a shipper whose goods form part of a consolidated container load. Imported containers whose destinations are within the 50-mile zone are subject to ILA stripping or 30 days' warehouse storage only if the owner does not unload the goods at his own warehouse facilities. None of these differences, the ALJ found, are justified by differences in the transportation services provided by the steamship company, which in each case simply transports a sealed container aboard its vessel.[62] Apart from the discrimination among categories of shippers, the ALJ concluded that the additional delay, expense, and fines imposed upon shippers by the Rules, and the ambiguity of some of the provisions, made the Rules unjust and unreasonable to shippers.[63]

Upon review the Federal Maritime Commission adopted the findings and Initial Decision of the ALJ.[64] Conceding that the existence of a collective bargaining agreement was a factor worthy of consideration, the Commission concluded that it did not outweigh other transportation factors and failed to justify the disparity in treatment [17] among shippers.[65] The decision was issued on June 14, 1978. CONASA and NYSA filed a timely joint petition for review

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[62] JA 67a-68a.

[63] JA 69a.

[64] JA 103a-116a.

[65] JA 109a-111a.

of both the jurisdictional and the substantive determinations of the Commission.[66]

II. The Jurisdictional Issue

Petitioners CONASA and NYSA have addressed their briefs solely to the jurisdictional question, asserting that they have held their substantive challenge "in reserve," to be "only reached after the question of exemption has been resolved."[67] They contend that the FMC completely lacks jurisdiction over the PRMSA tariff provisions in question because they are work preservation rules derived directly from a collective bargaining agreement. In their view, the Rules are "governed by the specific provisions of federal labor law"[68] and should therefore be beyond the reach of any other regulatory scheme. The FMC, petitioners maintain, is simply "unequipped to deal with the sensitive and delicate collective bargaining process"[69]; it has "tor[n] asunder the accomplishments of more than fifteen (15) years of difficult and strike marked collective

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[66] Joint Petition for Review, D.C. Cir. No. 78-1776, filed August 9, 1978. This court held the case in abeyance pending adjudication by the United States Court of Appeals for the District of Columbia Circuit and by the Supreme Court in NLRB proceedings regarding the legality of the Rules on Containers. *See* discussion in Part II-A *infra*.

[67] Petitioners' brief at 7-8 n.10. Therefore, the merits of the FMC's decision are not before us upon review. Nevertheless, we are remanding the case *sua sponte* to the FMC for reconsideration in light of legal developments which occurred after the FMC's 1978 decision.

[68] Petitioners' brief at 2.

[69] Petitioners' reply brief at 1[illegible].

bargaining over the thorny issue of technological job displacement * * *." [70]

[18] CONASA and NYSA advance two grounds for recognizing a "labor exemption" from the federal shipping laws—the Maritime Labor Agreements Act of 1980 and the nonstatutory labor exemption doctrine. Neither ground provides a persuasive basis for denying the FMC's jurisdiction to determine whether tariff provisions incorporating the Rules on Containers violate the common carrier requirements of the shipping laws.

A. *The National Labor Relations Act and the Rules on Containers*

Petitioners emphasize that the National Labor Relations Board has jurisdiction over the Rules on Containers. They contend that the specific provisions of Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act[71] "provide the sole and exclusive test for adjudicating the validity of work preservation agreements." [72] According to their brief, "Congress expressed its preference for the NLRB, as 'the forum of choice,' in determining whether a labor agreement represented a legitimate work preservation program or an unlawful 'hot cargo' or other secondary boycott scheme." [73] We must therefore begin by examining the nature of the NLRB's jurisdiction.

Section 8(b)(4)(B) of the National Labor Relations Act prohibits unions and their agents from engaging in "sec-

[70] *Id.* at 14 n.14.

[71] 29 U.S.C. §§ 158(b)(4)(B), 158(e) (1976).

[72] Petitioners' brief at 26b.

[73] *Id.* at 49.

ondary" activities whose object is to force one employer to cease doing business with another. Section 8(e) outlaws those collective bargaining agreements in which the employer agrees to cease doing business with any other person. Neither section encompasses legitimate work preservation agreements with "the purpose of preserving [19] for the contracting employees themselves work traditionally done by them." [74]

In unfair labor practice proceedings initiated by trucking companies and consolidators, the NLRB concluded that the Rules on Containers violated Section 8(e) and that union action to enforce them violated Section 8(b)(4)(B).[75] Defining the work in controversy as offpier stuffing and stripping of containers—which had not traditionally been performed by longshoremen—the Board held that the Rules on Containers "did not have a lawful work-preservation object." [76] In an enforcement proceeding this court held that the Board had erroneously defined the "work in controversy" because it had ignored traditional work patterns.[77] The Supreme Court affirmed this Court's decision, agreeing that the Board's approach to defining the work at issue was incorrect as a matter of law. The Court remanded to

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[74] *NLRB* v. *Enterprise Ass'n of Steam, etc. Pipefitters, Local No. 638*, 429 U.S. 507, 517 (1977), *quoted in NLRB* v. *Internat'l Longshoremen's Ass'n*, *supra* note 4, 447 U.S. at 504.

[75] *Internat'l Longshoremen's Ass'n*, *supra* note 56, 221 NLRB 856; *Internat'l Longshoremen's Ass'n*, 231 NLRB 351 (1977) and 236 NLRB 525 (1978), *rev'd*, 613 F.2d 890 (D.C. Cir. 1979), *aff'd*, 447 U.S. 490 (1980).

[76] *Internat'l Longshoremen's Ass'n*, *supra* note 75, 236 NLRB at 526.

[77] *Internat'l Longshoremen's Ass'n* v. *NLRB*, *supra* note 10, 613 F.2d at 908-910.

the Board for careful analysis of the relationship between traditional longshore work and the work assigned to ILA members by the Rules on Containers. It expressly stated that the FMC proceedings regarding the Rules "present difficult and complex problems which are not properly before us." [78] On remand the Board's Administrative Law Judge [20] issued an Initial Decision upholding the Rules in large part but invalidating them in some particulars.[79] The comprehensive opinion offers a detailed analysis of the traditional patterns of freight movement and the job functions performed by longshoremen, motor carrier drivers, public warehousemen, consolidators, and others.

Even a brief discussion of the labor law proceedings demonstrates that NLRB examination of the Rules on Containers differs substantially from FMC scrutiny under the federal shipping laws. This difference reflects the two functions played by the collective bargaining provisions. The Rules govern the relationship between labor and management; incorporated into tariff provisions filed by steamship companies, they also govern the relationship between shipping customers and steamship operators. The ALJ at the NLRB noted that the NLRB and the FMC are responsible for "effectuating different Congressional policy pursuant to different legislative standards."[80] The NLRB's interpretation of Sections 8(b)(4) and 8(e) does not an-

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[78] *NLRB* v. *Internat'l Longshoremen's Ass'n*, *supra* note 4, 447 U.S. at 509-512.

[79] NLRB Initial Decision, *supra* note 4.

[80] *Id.* at 73. Although the legislative standards are different, some of the policy factors germane to the NLRB's decision should also be taken into account by the FMC in its shipping-law determination. *See* Part III *infra*.

swer the questions the FMC is required to ask—do the Rules unduly discriminate against certain shippers, and are they unjust and unreasonable?[81]

B. *The Maritime Labor Agreements Act of 1980*

Even if the issues considered by the NLRB and the FMC do not coincide, Congress has the power to exclude work preservation agreements from the jurisdiction of the latter agency. Petitioners contend that Congress exercised that power by enacting the Maritime Labor [21] Agreements Act of 1980. We find that the language and legislative history of the statute fail to bear out petitioners' contention; the Act did not deprive the FMC of jurisdiction over this case.

The Maritime Labor Agreements Act of 1980 was the product of a legislative attempt to clarify jurisdictional boundaries in the area where labor law and shipping law intersect—the provisions of maritime collective bargaining agreements. Historically the FMC had taken the position that none of these agreements were subject to the provisions of Section 15 of the Shipping Act, which requires that a wide range of maritime agreements be filed with and approved by the Commission before they may enter into effect.[82] However, beginning in 1968,[83] judicial decisions

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[81] If the Rules are ultimately invalidated under the National Labor Relations Act, the FMC's proceedings will of course be moot.

[82] 46 U.S.C. § 814 (1976); *see* S. Rep. No. 96-854, 96th Cong., 2d Sess. 1, 7 (1980); H.R. Rep. No. 96-876, 96th Cong., 2d Sess. 2 (1980). The question of the applicability of the substantive provisions of the shipping laws to collective bargaining agreements apparently did not arise.

[83] *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261 (1968); *see* note 105 *infra*.

had held that Section 15 covered certain collective bargaining agreements and multi-employer agreements to implement promises made in collective bargaining.[84] In 1980 the House, citing the national policy of "free collective bargaining without a requirement of prior government approval," [85] adopted a bill which completely exempted collective bargaining agreements from FMC regulations.[86] The House bill removed FMC jurisdiction to review maritime labor agreements, before or after implementation, or to determine their legality under the [22] substantive provisions of the shipping laws.[87] This blanket labor exemption aroused strong opposition.

At hearings held by the Senate committee, shippers, consolidators, and other witnesses objected that the bill "stripped the FMC of jurisdiction to assure equal treatment of shippers, cargo, and localities and to prevent abuses made possible by one concerted activity of carriers and others."[88] In response, the Senate committee drafted

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[84] *Id; FMC* v. *Pacific Maritime Ass'n*, 435 U.S. 40 (1978); *New York Shipping Ass'n* v. *FMC*, 495 F.2d 1215 (2d Cir.), *cert. denied*, 419 U.S. 964 (1974).

[85] H.R. Rep. No. 96-876, *supra* note 82, at 5.

[86] *Id.* at 10-12.

[87] *Id.* at 11. Despite the blanket exemption from FMC jurisdiction, the House report stated, "This amendment does not preclude any common carrier utilizing rates, fares, or charges which unjustly discriminate between shippers or ports, or are unjustly prejudicial to U.S. exporters, from being subject to complaints before the Commission." *Id.* at 8. The House committee seems to have assumed an implicit proviso to the exemption similar to the one expressly included in the Senate's amendment.

[88] *See* S. Rep. No. 96-854, *supra* note 82, at 10; *Hearing Before the Subcommittee on Merchant Marine and Tourism of the Senate Committee on Commerce, Science, and Transportation on H.R. 6613*, 96th Cong., 2d Sess. (1980).

a revised bill to assure "that Federal Maritime Commission jurisdiction is preserved to the extent necessary" to assure equal treatment and to prevent abuses.[89] The bill was adopted by the Senate without debate,[90] and passed by the House, again without debate.[91]

Section 5 of the Act exempts maritime labor agreements from regulation under all provisions of the Shipping Act of 1916 and the Intercoastal Shipping Act of 1933, with the proviso that there would be no exemption

> for any rates, charges, regulations, or practices of a common carrier by water or other person subject to [23] this chapter which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to[,] a maritime labor agreement.[92]

This proviso appears to retain existing FMC jurisdiction over the Rules on Containers as applied to shipping customers through steamship company tariffs.[93] Explicitly

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[89] *See* S. Rep. No. 96-854, *supra* note 82, at 10. This assurance was repeated several times in the Senate report. *Id.* at 1-2 (statement of purpose), 2 (background and need), 13 (regulatory impact), 14 (section-by-section analysis).

[90] 126 Cong. Rec. S9778 (daily ed. July 24, 1980).

[91] *Id.* at H6791-H6792 (daily ed. July 30, 1980).

[92] 46 U.S.C.A. § 841c (1981 Pocket Part); *see* S. Rep. No. 96-854, *supra* note 82, at 19.

[93] Petitioners seek to avoid the § 5 proviso by arguing that the challenged tariff provisions are in the exact words of the collective bargaining agreements and therefore do not "arise out of" and are not "otherwise related to" a maritime labor agreement. Petitioners' brief at 30-31. This argument is not persuasive, because the proviso extends to all matters "which are required to be set forth in a tariff"; the relationship of these provisions to maritime labor agreements is not controlling. 46 U.S.C.A. § 841c (1981 Pocket Part).

aware of the clash of interests created by the Rules,[94] Congress sought to retain FMC jurisdiction to scrutinize the Rules' adverse effects upon shippers.[95] Moreover, under well established shipping law doctrine, all terms and conditions relating to a carrier's acceptance and carriage of cargo must be set forth in its tariffs.[96] In 1969 [24] the FMC decided that tariff provisions derived from the Rules on Containers were required to be set forth in a carrier's tariff,[97] and in 1977 a federal district court adopted a similar interpretation of the tariff filing provisions.[98]

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[94] *See* S. Rep. No. 96-854, *supra* note 82, at 6, 8-9; H.R. Rep. No. 96-876, *supra* note 82, at 4.

[95] S. Rep. No. 96-854, *supra* note 82, at 13 ("the bill retains the existing protections of the Shipping Act for shippers, carriers and localities which may be adversely affected by shipping practices which may arise out of maritime labor agreements").

[96] 46 U.S.C. § 817(b)(1) (1976) (tariffs in foreign commerce shall show "the classification of freight in force," shall state "any rules or regulations which in anywise change, affect, or determine any part or the aggregate of * * * rates, or charges," and shall include "specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement"); *id.* § 817(a) (carriers in interstate commerce shall file rates, fares, and charges with FMC); *id.* § 844 (tariffs in intercoastal commerce subject to requirements similar to tariffs in foreign commerce). *See Order That A. H. Bull Steamship Co. Show Cause*, 7 FMC 133, 136 (1962).

[97] *South Atlantic & Caribbean Lines, Inc.*, 12 FMC 237, 238-242 (1969).

[98] *United States* v. *Sea-Land Service, Inc.*, 424 F.Supp. 1008, 1011, 1012 (D. N.J. 1977), *appeal dismissed mem.*, 577 F.2d 730 (3d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). The FMC has recently instituted proceedings against steamship carriers which adhere to the Rules without incorporating the provisions into their tariffs. NLRB Initial Decision, *supra* note 4, at 66-67 (referring to order of investigation dated February 3, 1981, Docket No. 81-11).

We need not decide the scope of the proviso to Section 5, however, because another provision of the 1980 statute unequivocally preserves existing FMC jurisdiction over the present proceedings. Section 6 states that the changes made by the Act "shall not affect * * * formal Commission proceedings commenced prior to the date of enactment of this Act."[99] Moreover, the Senate committee expressly referred to these consolidated FMC proceedings, noting that they were pending on appeal before this court.[100] The 1980 legislation in its ultimate form thus has no bearing on the FMC's jurisdiction over the Rules on Containers in Dockets Nos. 73-17 and 74-40. We must turn to the nonstatutory law which defined FMC jurisdiction over the products of collective bargaining agreements prior to 1980.

[25] C. *The Nonstatutory Labor Exemption*

Although the federal shipping laws, prior to 1980, did not expressly create any statutory exemption for collective bargaining agreements, the FMC and the courts recognized a partial nonstatutory exemption in an effort to accommodate the overlapping regulatory schemes of shipping, labor, and antitrust law. If an agreement is exempt, the FMC does not exercise jurisdiction to determine whether it violates the law, but even if an agreement is not exempt it nevertheless might be lawful under the Shipping Act of 1916 and the Intercoastal Shipping Act of 1933.[101]

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[99] Maritime Labor Agreements Act of 1980, § 6, Pub. L. No. 96-325, 94 STAT. 1021 (1980); *see* S. Rep. No. 96-854, *supra* note 82, at 6.

[100] S. Rep. No. 96-876, *supra* note 82, at 9 n.10.

[101] *See FMC* v. *Pacific Maritime Ass'n*, *supra* note 84, 435 U.S. at 57 (most collective bargaining agreements would be routinely

No judicial precedents address the precise issues raised in this case: whether any labor-management agreements are exempt from the substantive provisions of the shipping laws, and, if so, whether enforcement of the collectively-bargained Rules on Containers qualifies for exemption. Prior cases delineating the nonstatutory labor exemption from the shipping laws have dealt with the pre-implementation filing and approval requirements of Section 15 of the Shipping Act of 1916, not with the prohibitions against unreasonably discriminatory and unjust rates and practices in Section 14, 16, and 18.[102] We need not decide whether this nonstatutory exemption applies to the substantive provisions of the shipping laws, because the Rules on Containers would not qualify for such an exemption under the definition adopted by the [26] Supreme Court. In 1978 the Court decided, in *FMC* v. *Pacific Maritime Ass'n*, that an agreement is not exempt if it directly imposes terms on persons or entities outside the agreement.[103] The Commis-

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approved upon filing under § 15); *cf. id.* at 61 (distinguishing between exemption and liability issues in antitrust context); *Connell Const. Co.* v. *Plumbers & Steamfitters Local Union 100*, 421 U.S. 616, 637 (1975) (agreement not exempt; remand for consideration of whether it violated Sherman Act).

[102] 46 U.S.C. §§ 812, 815, 817 (1976); this case also involves the similar provisions of § 845(a).

[103] *FMC* v. *Pacific Maritime Ass'n*, *supra* note 84, 435 U.S. at 56 (exemption should not be construed broadly if impact on competition is [sic] " 'neither *de minimis* nor routine' " [sic]); *id.* at 63:

> Nor are we impressed with other arguments that in one guise or another are contentions that the Commission, for lack of ability and experience, should not purport to deal with any collective-bargaining agreement but should leave the entire matter of anticompetitive labor-management contracts to the courts and the antitrust laws. • • • Congress has made the

sion contends that this restrictive principle applies to tariffs filed by carriers as well as to collective bargaining agreements. *See* note 125 *infra*. We conclude that, because enforcement of the Rules on Containers by inclusion in steamship company tariffs imposes terms on third parties, it raises shipping law issues which are within the FMC's statutory responsibilities. This case is therefore not beyond the scope of FMC jurisdiction.

1. *Precedents recognizing the nonstatutory exemption*

Judicial decisions have recognized that some labor-management agreements are exempt from the requirements of Section 15 of the Shipping Act, 46 U.S.C. § 814 (1976). Section 15 requires regulated parties, including steamship carriers, to submit certain categories of agreements to the FMC for review and approval prior to implementation; FMC approval confers immunity from antitrust liability. A collective bargaining agreement [27] may fall within several of the categories covered by Section 15: it may fix or regulate transportation rates or fares; control, regulate, prevent, or destroy competition; pool or apportion earnings, losses, or traffic; limit or regulate the volume or character of freight or passenger traffic to be carried; or provide for an exclusive, preferential or cooperative working agreement.[104] Such agreements must be filed with the FMC

Commission the arbiter of competition in the shipping industry * * *.

See United Stevedoring Corp. v. *Boston Shipping Ass'n*, 16 FMC 7, 10 (1972) (*Boston Shipping*) (following previous Supreme Court decision broadly defining FMC jurisdiction).

[104] 46 U.S.C. § 814 (1976). The FMC has the power to "disapprove, cancel or modify" any such agreement that it finds to be

for review under Section 15 unless they satisfy a set of criteria modeled on the nonstatutory labor exemption from the antitrust laws.[105]

Two rationales support the use of antitrust law principles as a model in Section 15 exemption cases. First, the [28] labor exemption from antitrust regulation has been developed judicially over the course of four decades to reconcile the system of collective bargaining with the potentially inconsistent dictates of another statutory scheme[106]; hence its principles serve as a useful guide in the shipping law context.[107] Second, a labor agreement which is exempt

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"unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, * * * or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter[.]" *Id.*

[105] *In Volkswagenwerk Aktiengesellschaft* v. *FMC*, *supra* note 83, 390 U.S. 261, the Supreme Court held that § 15 applied to an inter-employer agreement to implement the provisions of a labor-management agreement creating a $29 million [dollar] fund to mitigate the effects of technological job displacement. Although the case did not directly involve a labor-management agreement, *id.* at 278, it established a broad scope for § 15, *id.* at 273-276.

Subsequently the FMC held that § 15 did not provide a blanket exemption for collective bargaining agreements. *Boston Shipping*, *supra* note 103, 16 FMC at 15. The Commission quoted Justice Harlan's concurring opinion in *Volkswagenwerk*: "I see no warrant for assuming, in advance, that a maritime agreement must always fall neatly into either the Labor Board or Maritime Commission domain; a single contract might well raise issues of concern to both." *Id.* at 13, *quoting* 390 U.S. at 286. Instead, the FMC delineated a nonstatutory labor exemption modeled on the labor exemption from the antitrust laws. *See* discussion *infra*. The statute authorizes the FMC to exempt classes of agreements from any provision of the shipping laws. 46 U.S.C. § 833a (1976).

[106] *See generally* Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1192-1224 (1980).

[107] The FMC relied on *Allen Bradley Co.* v. *Local 3, Internat'l Brotherhood of Electrical Workers*, 325 U.S. 797 (1945) (*Allen*

from the antitrust laws because of its indirect impact on the commercial market might not raise Section 15 issues and would not benefit from the FMC's power to grant antitrust immunity.[108]

[29] In *United Stevedoring Corp.* v. *Boston Shipping Ass'n*, 16 FMC 7 (1962) (*Boston Shipping*), the FMC defined the criteria for a nonstatutory labor exemption from the shipping laws. The case involved agreements between employers to implement the provisions of a labor-management collective bargaining agreement. Recognizing the need to "reconcil[e] or accommodat[e] Shipping Act pol-

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Bradley) (exemption denied); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965) (*Pennington*) (exemption denied); and *Local Union #189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965) (opinion of White, J., joined by two other Justices) (*Jewel Tea*) (exemption allowed). *See Boston Shipping, supra* note 103, 16 FMC at 11-12. In *Jewel Tea* the six-member majority divided evenly between the opinions of Justice White and Justice Goldberg; however, the FMC in *Boston Shipping* relied on Justice White's opinion. *Compare id.* at 12 *with Jewel Tea*, 381 U.S. at 689-690.

The Supreme Court has recognized that, although antitrust law precedents served as a model, they do not control the scope of the shipping law exemption for labor agreements:

> [S]ince the Shipping Act contains its own standards for exempting and for approving and disapproving agreements between carriers, and because the ultimate issue in cases such as this is the accommodation of the Shipping Act and the labor laws, rather than the labor laws and the antitrust laws, it will not necessarily be a misapplication of the statutes if the exemption for collective-bargaining contracts from Shipping Act requirements is not always exactly congruent with the so-called labor exemption from the antitrust laws as understood by the courts.

FMC v. *Pacific Maritime Ass'n, supra* note 84, 435 U.S. at 63.

[108] *FMC* v. *Pacific Maritime Ass'n, supra* note 84, 435 U.S. at 53, 58.

icies,"[109] the FMC derived four "guidelines" from the Supreme Court cases exempting labor agreements from antitrust regulation. First, the underlying collective bargaining must be in good faith and at arm's length.[110] Second, the matter must be "intimately related or primarily and commonly associated with a bona fide labor purpose."[111] Third, the result of [30] the collective bargaining must not "impose terms on entities outside of the collective bargaining group."[112] Fourth, there must be no conspiracy

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[109] *Boston Shipping, supra* note 103, 16 FMC at 10.

[110] *Id.* at 13. The FMC cited *Allen Bradley, supra* note 107, a case in which unions and management agreed to create and enforce a local monopoly in electrical equipment, and *Pennington, supra* note 107, in which the UMW and the larger coal mine companies reached agreement that the unions would impose high wages and royalties on all companies, allegedly for the purpose of eliminating smaller operators from the industry. The Supreme Court denied antitrust exemptions in both cases. In contrast, in *Jewel Tea, supra* note 107, the Court granted the exemption in a case which "comes to us stripped of any claim of a union-employer conspiracy * * *." 381 U.S. at 688.

[111] *Boston Shipping, supra* note 103, 16 FMC at 12-13. The FMC paraphrased Justice White's discussion in *Jewel Tea, supra* note 107, which determined that the challenged restriction, "like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies * * * falls within the protection of the national labor policy * * *." 381 U.S. at 689-690. *Cf. Pennington, supra* note 107, 381 U.S. at 664-665 (legitimate subject of union concern, such as wages, is a necessary but not sufficient condition for antitrust law exemption; "because they must bargain does not mean that the agreement reached may disregard other laws").

[112] *Boston Shipping, supra* note 103, 16 FMC at 13. This criterion distinguishes between separate union-management agreements which establish similar wages and working conditions, thereby affecting competition *indirectly* through their impact on costs, prices,

between labor and management.[113] The FMC noted that "[t]hese criteria are by no means meant to be exclusive nor are they determinative in each and every case. • • • They are rather guidelines or 'rules of thumb' for each factual situation."[114] The FMC expressly adopted a case-by-case balancing test, weighing the agreement's effect on business against its impact on collective bargaining.[115]

[31] Applying these standards, the Commission then found that the inter-employer agreements at issue in *Boston Shipping* were exempt from the shipping acts. First, the incorporation papers and by-laws creating a multi-employer collective bargaining association were exempt because they involved "purely labor matters"; "no valid reg-

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and profits, *see Jewel Tea, supra* note 107, 381 U.S. at 688; *Pennington, supra* note 107, 381 U.S. at 664, *citing Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503-504 (1940), and labor-management conspiracies to drive the employers' competitors out of business by imposing specified terms *directly* upon them, *see Pennington, supra* note 107, 381 U.S. at 665-668.

[113] *Boston Shipping, supra* note 103, 16 FMC at 13. *See* note 110 *supra*.

[114] *Boston Shipping, supra* note 103, 16 FMC at 12.

[115] *Id.* at 13. The Commission wrote:

> The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon competition, and whether any such effect is a direct and probable result of the activity or only remote. Ultimately, the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement. • • •

Id. This balancing test echoed Justice White's approach in *Jewel Tea, supra* note 107, 381 U.S. at 690 n.5: "The crucial determinant is not the form of the agreement • • • but its relative impact on the product market and the interests of union members." *See* Leslie, *supra* note 106, 66 VA. L. REV. at 1184, 1217 (criticizing uncertainty created by *ad hoc* balancing test in antitrust law).

ulatory purpose would be served" by requiring Section 15 review.[116] Second, an agreement regarding initial allocation of labor gangs among stevedores was exempt because "in actuality [it] amounted to nothing more or less than the hiring by employers of employees." Labor considerations were "strong," while the effects upon competition in the industry were "minimal and remote."[117] Third, a "first call-recall" agreement, which created procedures for assignment and reassignment of employees, satisfied all four guidelines; the FMC expressly noted that "no terms were imposed on entities outside the collective bargaining group."[118]

In *FMC* v. *Pacific Maritime Ass'n*, 435 U.S. 40 (1978), the Supreme Court cited these guidelines with approval. The Court declined to confer a categorical Section 15 exemption on all collective bargaining agreements,[119] deferring to Congress' determination to " 'subject to the scrutiny of a specialized governmental agency the myriad of restrictive agreements in the maritime industry.' "[120] [32] The Court, however, accepted the FMC's guidelines for exempting some cases from pre-implementation review.

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[116] *Boston Shipping, supra* note 103, 16 FMC at 13-14.

[117] *Id.* at 14.

[118] *Id.* at 14-15. The "first call-recall" agreement was embodied in a collective bargaining agreement as well as in an inter-employer agreement.

[119] 435 U.S. at 53-60. This court had held that any collective bargaining agreement, whatever its impact on competition, was exempt from filing with the FMC under § 15. *Pacific Maritime Ass'n* v. *FMC*, 543 F.2d 395 (D.C. Cir. 1976), *rev'd*, 435 U.S. 40 (1978).

[120] 435 U.S. at 56, *quoting Volkswagenwerk Aktiengesellschaft* v. *FMC, supra* note 105, 390 U.S. at 276.

Quoting the *Boston Shipping* decision at length,[121] the Court held that the guidelines were not satisfied by the Pacific Maritime Association's collective bargaining agreement with the union. The agreement allowed employers outside the collective bargaining group to participate in the group's hiring halls and centralized fringe benefit plans only on specified terms.[122] "PMA and the Union," the Court noted, "had undertaken to impose employment terms and conditions on employers outside the bargaining unit," thereby eliminating a competitive advantage previously enjoyed by nonmembers.[123]

2. *The Rules on Containers and the labor exemption*

The FMC advances two grounds for denying a labor exemption for the Rules on Containers as incorporated into the PRMSA tariff. First, it contends that the nonstatutory labor exemption applied only to Section 15, and [33] not to

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[121] 435 U.S. at 51 n.15 (lengthy quote from *Boston Shipping*); *see id.* at 63 (Commission's nonstatutory exemption demonstrates "sensitivity to the national labor policy").

[122] Prior to the agreement, nonmember employers had negotiated agreements with the union whose terms were sometimes more flexible and more advantageous to the employers than the terms of union-PMA agreements. Nonmember employers were also permitted to enter into separate agreements with PMA to secure their work force through PMA-union hiring halls and to participate in the fringe benefit plans administered by PMA. *Id.* at 46-47. During the 1970 contract negotiations PMA sought to eliminate nonmember participation in the hiring halls and benefit plans in order to encourage nonmembers to join PMA. The parties reached a compromise. PMA accepted continued nonmember participation on the condition that participating nonmembers would be required to agree to pay the same dues and assessments as PMA members, follow the same work rules, and "be treated as a member during work stoppages." *Id.* at 47.

[123] *Id.* at 62.

any other provisions of the shipping laws.[124] Second, it asserts that, assuming *arguendo* that there is a labor exemption from the substantive provisions and that it applies to tariffs as well as to agreements, the Rules on Containers do not satisfy the *Boston Shipping* criteria.[125] We find the second contention persuasive and therefore need not reach the first issue.[126]

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[124] Respondents' brief at 40-45.

[125] *Id.* at 48-58. The Commission recognizes the applicability of the *Boston Shipping* criteria to the tariff rules in question. "While the four specific *Boston Shipping* criteria were designed to guide the application of a labor exemption to agreements under section 15, especially collective bargaining agreements, and therefore their language does not precisely apply to an implementing tariff filed unilaterally by a carrier," the Commission argued, "the principles underlying them and the 'final analysis' do apply." Respondents' brief at 48-49. The Commission further argued that, because the tariff imposed terms on non-parties, "*PMA* controls this case, and properly so * * *." *Id.* at 51-52. We agree with the Commission, notwithstanding the dissent's assertion of the "inappositeness of applying that rationale [the *PMA* test] concerning a collective bargaining agreement to this case involving a tariff." Dissent at 4.

[126] The general rationale for the § 15 exemption—the need to harmonize two potentially conflicting statutory schemes by eliminating overlapping jurisdiction in appropriate cases—would support recognition of a nonstatutory labor exemption from the substantive provisions of the shipping laws. In *FMC v. Pacific Maritime Ass'n, supra* note 84, the Supreme Court appeared to recognize the broad purposes of the labor exemption, although it also found that they did not require a categorical § 15 exemption. 435 U.S. at 57-58, 63 (commending FMC's "sensitivity to the national labor policy by exempting from the filing requirements all collective-bargaining contracts that in its view would also be exempt from the antitrust laws"). If sensitivity to the national labor policy justifies relieving certain labor agreements from the burdens of pre-implementation filing, it might also support relief from protracted adjudication before the FMC and the courts concerning the legality of these agreements. However, the discussion in the majority opinion does not provide guidance on this issue. In contrast, the dissent assumed that there would be no exemption

[34] One of the four *Boston Shipping* guidelines[127] permits a labor exemption only if "[t]he result of the collective bargaining does not impose terms on entities outside of the collective bargaining group." [128] Although none of the criteria is "determinative," [129] consideration of each factor facilitates the balancing of an agreement's effect on the business market against its impact on collective bargaining.[130] If an agreement "impose[s] terms" on employers or customers outside of the collective bargaining group, [35] then its effect on shippers' interests and on competi-

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from the substantive provisions of the shipping laws. *Id.* at 68-69, 77. This position provides no basis for inferring that the majority of the Court would have denied the existence of any exemption from the substantive sections; the majority and the dissent adopted two entirely different criteria for delineating the FMC's jurisdiction. The dissent drew the line between prior restrain of collective bargaining agreements by the FMC, which it wished to avoid, and subsequent review, which it was willing to permit in all cases. The majority, on the other hand, permitted prior review in some cases but exempted agreements fulfilling the *Boston Shipping* guidelines. If the issue were raised, the Court might extend the *Boston Shipping* criteria to the substantive shipping law provisions. We need not decide the question in this case.

[127] The Rules of Containers appear to satisfy the other three *Boston Shipping* guidelines. First, the history of labor-management confrontation between the steamship companies and the ILA makes clear that the bargaining was at arm's length. *See* discussion in Part I-A *supra*. Second, work preservation is "intimately related" to "a bona fide labor purpose." *See Nat'l Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 642 (1967). Third, there is no evidence of conspiracy between labor and management; the interests of the two sides are fundamentally different. *See* text at notes 10-34 *supra*.

[128] *FMC v. Pacific Maritime Ass'n*, *supra* note 84, 435 U.S. at 51 n.15; *Boston Shipping*, *supra* note 103, 16 FMC at 13.

[129] *Id.* at 12.

[130] *FMC v. Pacific Maritime Ass'n*, *supra* note 84, 435 U.S. at 61.

tion[131] is likely to be "direct and probable" rather than "remote," and it will probably implicate significant shipping law policies. Generally, therefore, such an agreement will fall within the jurisdiction of the Federal Maritime Commission.

The Rules on Containers, as incorporated into the PRMSA tariff, directly impose terms on third parties.[132] As in *Pacific Maritime Association*, the shipping employers agreed not to deal with outsiders except upon terms and conditions specified in the collective bargaining agreement. In *Pacific Maritime Association* employers outside the bargaining unit were required to accept uniform contract conditions with longshoremen in order to enjoy the benefits of participation in hiring halls and fringe benefit plans. In our case consolidators and other shipping customers are required to accept the PRMSA tariff Rules on Containers in order to obtain ocean transportation services.[133]

Moreover, the Rules have direct and probable effects on shippers' interests and on competition in the shipping [36]

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[131] Although the antitrust cases speak solely of an agreement's effect on competition, the Supreme Court has recognized the need to adapt the antitrust labor exemption criteria to the shipping law context. *See* note 107 *supra*. In antitrust law, imposition of terms on the employer's business competitors may deprive a labor-management agreement of an exemption. In the shipping context the regulatory scheme protects shipping customers as well as competitors. An agreement should not be exempt when terms are imposed either upon the employer's competitors or upon the employer's shipping customers.

[132] The tariff sets forth the terms and conditions upon which shippers and consignees may deal with the carrier. *See* note 96 *supra*.

[133] In both cases the third parties were not compelled to deal with the shipping employers, but failure to do so would have adverse economic effects; on the other hand, the standardized terms imposed significant burdens on the third parties.

industry, both of which are subject to FMC regulation. The record fully documents the impact that enforcement of the Rules would have on importers, exporters, consolidators, distributors, and others who transport goods by sea.[134] Consolidators are competitors as well as customers of the steamship lines, offering alternative arrangements for ocean transportation of smaller shipments. Those consolidating companies which previously operated within the 50-miles zone are deprived of business under the Rules, or subjected to substantial cost increases and shipping delays, in order to preserve the work opportunities of longshoremen employed at the docks by steamship operators. We take no position on whether the Rules are legal, but we are unable to conclude that the shipping interests are either indirect or insignificant in relation to collective bargaining factors.[135] Therefore, the FMC has jurisdiction to consider the legality of the Rules on Containers under the shipping laws.[136]

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[134] *See* discussion in Part I-A and Part I-B *supra*.

[135] Petitioners maintain that, even if the Rules on Containers have direct effects on shipping interests, these effects are also unavoidable and should not disqualify the Rules for an exemption. The Supreme Court, however, has held that the FMC has jurisdiction in all cases in which terms are imposed directly upon third parties. *See FMC v. Pacific Maritime Ass'n, supra* note 84. The necessity of the collective bargaining provisions at issue is a factor the FMC should consider in making its substantive determination of legality. *See* 435 U.S. at 57, 63; *New York Shipping Ass'n v. FMC, supra* note 84, 495 F.2d at 1222.

[136] The cases cited by petitioners in support of a contrary proposition, petitioners' brief at 44-45, are inapposite. The legality of a work preservation agreement under the labor laws, *id.* at 44-46, is a separate issue from its eligibility for exemption from FMC shipping law jurisdiction. *See NLRB v. Internat'l Longshoremen's Ass'n, supra* note 4, 447 U.S. at 512; discussion in Part II-A *supra*.

The criteria for a labor exemption from the antitrust laws, also relied upon by petitioners, petitioners' brief at 46-48, are not

III. Conclusion

[37] We remand the record in this case to the Federal Maritime Commission for reconsideration of its decision on the merits. The Initial Decision in this case was rendered in October 1975, more than six years ago. In June 1978, more than three years ago, the FMC adopted the Initial Decision. The Commission did not examine the implications of two recent Supreme Court decisions, *FMC* v. *Pacific Maritime Ass'n, supra,* which asserts the importance of labor policy in reaching substantive shipping law decisions, 435 U.S. at 57, 63, and *NLRB* v. *Internat'l Longshoremen's Ass'n,* 447 U.S. 490 (1980), which discusses the role of collective bargaining in resolving the problems created by technological job displacement. In the interests of justice, the FMC should have the opportunity to reconsider its previous determination in light of these two decisions.

The record in this proceeding is therefore

Remanded.

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identical to those for a labor exemption from the shipping laws. *See* notes 107 & 131 *supra*. For example, even though courts do not agree on whether imposition of terms outside the bargaining unit is sufficient to defeat an antitrust law exemption, respondents' brief at 53-54, *FMC v. Maritime Ass'n, supra* note 84, 435 U.S. at 61-63, makes clear that imposition of terms on third parties disqualifies an agreement from exemption under the shipping laws. Therefore, even if the Rules are exempt from antitrust scrutiny, as one Court of Appeals has held, *see Intercontinental Container Transport Corp. v. New York Shipping Ass'n,* 426 F.2d 884, 888 (2d Cir. 1970), they might not be exempt from the shipping laws, and vice versa.

Finally, *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962), cited in petitioners' brief at 50-55, a case dealing with Interstate Commerce Commission and National Labor Relations Board jurisdiction over "hot cargo" agreements, reversed the ICC's choice of remedy. However, it expressly acknowledged the ICC's authority to enforce the common carrier obligations imposed by the Interstate Commerce Act against carriers constrained by labor agreements. *See id.* at 173-174.

Appendix A—Opinion of the United States Court of Appeals for the District of Columbia Circuit

[1] MacKinnon, *Circuit Judge* (concurring in part and dissenting in part). The majority opinion holds that the Federal Maritime Commission (FMC or Commission) has jurisdiction to determine whether shippers' tariffs that incorporate the Rules on Containers violate the common carrier requirements of the shipping laws. Maj. Op. at 18. I concur in this part of the opinion and in so doing reject the claim of the Council of North Atlantic Shipping Associations and the New York Shipping Association (Petitioners) that the validity of the attempts at work preservation embodied in the collective bargaining agreement between Petitioners and the International Longshoremen's Association (Union) is to be determined solely under the National Labor Relations Act and specifically under sections 158(b)(4)(B) and (e) of that Act.[1] Also with respect to the Maritime Labor Agreements Act of 1980, Pub. L. No. 96-325, 94 Stat. 1021 (1980) (MLAA), I concur in the interpretation that collectively bargained work preservation agreements were not thereby excluded from the *jurisdiction* of the Maritime Commission. Maj. op., 21.

I disagree, however, with the suggestion in *dictum* in a footnote[2] that the general rationale of the exemption for labor agreements from the *filing* requirements of section 15 of the Shipping Act, mandated by the MLAA, supports a nonstatutory labor exemption from the *substantive* provisions of the shipping laws. The majority suggests that the Supreme Court "might extend the *Boston Shipping* [*United Stevedoring Corp.* v. *Boston Shipping Ass'n*, 16 FMC 7 (1972)] criteria to the substantive shipping law provi-

[1] 29 U.S.C. § 158(b)(4)(B) and (e) (1976).

[2] Maj. op. at 33 n.126.

sions." I find no evidence for that speculation in the decisions of the Court. Moreover, the MLAA itself indicates that such an extension of the labor exemption was rejected by Congress when it considered the scope of the exemption it was granting in the MLAA [2] and *specifically rejected* its extension to the substantive shipping laws in precise language as follows:

> Sec. 5. Section 45 of the Shipping Act, 1916 (46 U.S.C. 842), and all references thereto, is redesignated section 46 and a new section is added as follows:
>
> "Sec. 45. The provisions of this Act and the Intercoastal Shipping Act, 1933, shall not apply to maritime labor agreements and all provisions of such agreements except to the extent that such provisions provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized. *Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this Act or of the Intercoastal Shipping Act, 1933 for any rates, charges, regulations, or practices of a common carrier by water or other person subject to this Act which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related, to a maritime labor agreement.*"

Pub. L. No. 96-325, § 5, 94 Stat. 1022 (1980) (emphasis added).

This enactment confirms the prior interpretation of the Shipping Act. In application, it means that the FMC *has jurisdiction* to apply the substantive provisions of the shipping laws to tariffs that incorporate the terms of collective

bargaining agreements. Thus, regardless of the source of the tariff's terms,

> Whenever the Federal Maritime Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice demanded, charged, collected, or observed by any carrier subject to the provisions of this chapter is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum and [3] minimum rate, fare, or charge, or a just and reasonable classification tariff, regulation, or practice:

46 U.S.C. § 845a (1976).

While the statement of the majority in footnote 126 is therefore purely dictum I am concerned lest it be given more weight than its soundness warrants. The FMC should ignore such comment because it is not soundly based in the statute, legislative history or adjudicated cases.

My principal disagreement with the majority opinion, however, is with its statement of the principle it relies upon to control this case. It asserts that the Supreme Court's 1978 holding in *Federal Maritime Commission* v. *Pacific Maritime Ass'n (PMA)*, 435 U.S. 40 (1978), is based on the principle that "an *agreement* is not exempt if it *directly* imposes terms on persons or entities outside the agreement." Maj. op. at 26 (emphasis added). There are at least two serious difficulties with the application of this rule in the instant case.

First, it fails to discuss the issue—strenuously argued by the intervenors—whether one can legally equate the Rules on Containers set forth in the *collective bargaining agreement* between the Union and the carriers with

those same Rules *as incorporated into the carriers' tariffs*. The failure even to consider this point is evident from the majority's statement of the test: an *"agreement"* is not exempt if it imposes terms *"directly"* on third parties. While the collective bargaining agreement may in some sense, because it includes the Rules, "impose" terms on shippers, *it is not that agreement which is under scrutiny here*. Rather, it is the *ocean tariffs* filed by the carriers.

Therefore, posing the test in terms of the "direct" effect of the *"collective bargaining agreement"* misstates the issue. The question presented to the Commission for con-
[4] sideration was either (a) the *indirect* effect the *agreement* has when its terms are included in a carrier's tariffs, or (b) the *direct* effect of the *tariffs*. The statement by the majority as to the applicable standard has one foot in each trough, and the result is bound to be hopelessly confusing if the courts or the FMC should attempt to apply it.

When one attempts to figure out how this apparently superficial flaw can be straightened out—by replacing "agreement" with "tariff," or by substituting "indirectly" for "directly"—it becomes apparent that the whole basis for the majority's statement of the controlling law is questionable. The problem is not a superficial one. It is the fundamental one of trying to use the *PMA* decision as authority for a premise the importance of which deserves thorough independent justification.

PMA involved the issue of whether there was a blanket exemption for *collective bargaining agreements themselves* from the *filing* requirements of section 15 of the Shipping Act. A panel of this court (Wright, McGowan, Tamm, J.J.) held that there *was* a blanket exemption, because to require pre-implementation approval of labor-management con-

tracts by the FMC would frustrate national labor policy favoring the quick resolution of labor disputes. The Supreme Court *reversed* that decision, holding that there was no *per se* exemption; rather, the Commission had jurisdiction at a minimum to require prior filing and approval of agreements whose impact on competition was "neither *de minimis* nor routine." 435 U.S. at 56. It is this phrase that the majority says controls here.

The rationale disapproved by the Supreme Court in reversing *PMA* should suggest the inappositeness of applying that rationale concerning a collective bargaining agreement to this case involving a tariff. This court's reasoning, which was based upon the need to avoid, not even the substantive law, but merely a pre-implementation [5] *procedure*—was explicitly rejected. Therefore, while *PMA* supports the very general proposition that *labor agreements* are to some extent subject to FMC scrutiny, it says little if anything about the Commission's role in evaluating *tariffs* derived from such agreements against the substantive provisions of the Shipping Act.

There is a very substantial distinction between collective bargaining agreements (which *PMA* held may or may not be exempt from *pre-implementation* scrutiny) on the one hand, and tariffs on the other. This distinction was brought to the attention of Congress in hearings on the MLAA both by the FMC[3] *and* by the Union;[4] the result was the explicit

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[3] Vice Chairman Moakley stated that "Under the present law, the tariff stands on its own and must be defended *as a tariff*." *Hearings Before the Subcomm. on Merchant Marine and Tourism of the Senate Comm. on Commerce, Science and Transportation on H.R. 6613*, 96th Cong., 2d Sess. 12 (1980) (emphasis added).

[4] President Gleason of the International Longshoremen's Association stated that "this union does not talk about tariffs. I think that is the companies' business . . ." *Id.* at 33.

distinction in section 5 of the MLAA between maritime labor agreements and matters "required to be set forth in a tariff." As intervenors rightly suggest, to ignore the distinction would be to reduce the incentive of a carrier—even one bargaining at arm's length—to bargain for labor agreements that are consistent with the Shipping Act's policies.

It must be remembered that the Shipping Act has as its primary purpose the protection of *shippers*, not carriers. From the standpoint of the shipper, the terms set forth in a tariff are the same regardless of whether they had their genesis in a collective bargaining agreement; the tariff is the only statement of terms imposed "directly" upon the shipper. National labor policy, while it may require that the FMC be kept out of the labor- [6] management bargaining process, does not prohibit the FMC from applying the substantive provisions of the Shipping Act to protect shippers from being forced to bear the cost of carriers' losses at the bargaining table merely because they were incorporated in a collective bargaining agreement.

I thus cannot join the majority's statement of the controlling law.[5] The tariffs at issue in this case are subject to the substantive shipping laws, not because they arise out of a collective bargaining agreement that falls short of complete exemption from scrutiny, but simply because they *are tariffs* subject to FMC review. Although it may ultimately be demonstrated that the principles underlying

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[5] The majority states that the Commission itself urged the applicability of *PMA* in arguing the present case. Maj. op. at 33 n.125. The Commission did not, however cite any decisions in which it has previously adopted this interpretation. In view of the testimony of Vice Chairman Moa[illegible] in the MLAA hearings, *see* note 3 *supra*, I question whether the Commission would upon a thorough consideration of the matter view *PMA* as controlling cases of the present kind.

PMA are applicable to cases involving the evaluation of tariffs under the substantive shipping laws, I cannot agree that *PMA* "controls" these cases.

Ultimately, I agree with the majority that assuming *arguendo* that a labor exemption is applicable here, the tariffs would still be within the FMC's jurisdiction under *Boston Shipping*. Maj. op. at 33-36. I therefore concur in upholding the FMC's exercise of its jurisdiction here.

I disagree, however, that it is either necessary or desirable that this case be remanded for further consideration. It is correct that the decision by the FMC was rendered some time ago; but one of the principal reasons for our delay was the stay the parties requested because of a pending case, *NLRB* v. *International Longshoremen's Ass'n*, 613 F.2d 890 (D.C. Cir. 1979), *aff'd*, 447 U.S. [7] 490 (1980).[6] That decision has now been released, and its failure to consider any question at issue here is grounds for *not* remanding the case. Indeed, both *PMA*, *supra*, and *International Longshoremen's Ass'n*, *supra*, have been decided since the FMC decision, but there is nothing in either decision that would cause the FMC to consider any questions of fact or law not previously considered and ruled upon. *International Longshoremen's Association* dealt solely with the work preservation issue under the *labor law*. Although petitioners do not concede that the Rules as incorporated into carrier tariffs violate the substantive shipping laws, they have chosen to limit their argument to the jurisdictional issue. We have no reason to believe

[6] This case was first postponed on motion of the Commission while *International Longshoremen's Association* was pending in this court. It was postponed a second time, this time at petitioners' instance, when the Supreme Court granted review of that decision.

that the Commission erred in applying the law as it stood at the time of its decision, and no reason to believe that law has since changed in any material respect. Consequently, returning the matter to the Commission for further proceedings can serve no useful purpose. I therefore dissent from the court's decision to remand the case.

APPENDIX B

Final Report and Order of Federal Maritime Commission

Served
June 14, 1978
Federal Maritime Commission

FEDERAL MARITIME COMMISSION

Docket No. 73-17

SEA-LAND SERVICE, INC. and GULF PUERTO RICO LINES, INC.—PROPOSED RULES ON CONTAINERS

Docket No. 74-40

PUERTO RICO MARITIME SHIPPING AUTHORITY—PROPOSED ILA RULES OF CONTAINERS

REPORT AND ORDER ADOPTING INITIAL DECISION

Docket No. 73-17 was instituted on April 13, 1973 to determine whether the so-called "50-mile container rules" proposed by Sea-Land Service, Inc. (Sea-Land) and Gulf Puerto Rico Lines, Inc. (GPRL) in the U.S. East and Gulf Coast/Puerto Rico trade were violative of sections 14 Fourth, 16 First, and 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act of 1933.

Thereafter, Respondent Sea-Land proposed revisions to its tariff rules which it claimed would cure the infirmities which led to the investigation and suspension. However, by Commission Order of August 10, 1973, these revisions were likewise placed under investigation. This investiga-

tion proceeded under the August 10 Order until September, 1974.

During the period between April, 1973 and September, 1974, Sea-Land and GPRL withdrew from the Puerto Rican trade and the Puerto Rico Maritime Shipping Authority (PRMSA) succeeded them [2] as an ocean common carrier in that trade. On August 2, 1974, PRMSA filed its tariff which was to become effective on September 16, 1974, at or about which date PRMSA was to enter the U.S. East and Gulf Coast/Puerto Rico trade as an ocean common carrier. Certain portions of that tariff set forth identical provisions to those already under investigation. Therefore, by Order of September 13, 1974, the Commission placed PRMSA's proposed tariff rules under investigation; consolidated the new investigation (Docket No. 74-40) with the existent Docket No. 73-17; and ordered that the record already adduced in Docket No. 73-17 be used to the fullest extent possible to develop the issues in Docket No. 74-40.

Thereafter, on February 14, 1975, PRMSA filed amendments to its proposed tariff. By Order of March 14, 1975 the Commission ordered that these amendments be made a part of the ongoing investigation and that any future change, amendment or reissuance be so incorporated. This Order put in issue the rules of PRMSA as they stood at the time of hearing.

During the course of these proceedings, various participants either were named as parties or intervened. As the case came before us, the parties to the proceeding, in addition to PRMSA, were: Commonwealth of Puerto Rico (Commonwealth), Council of North Atlantic Shipping Associations (CONASA), International Association of NVOCC's (NVOCC's), National Customs Bureau and Forwarders Association of America, Inc. (National), New

York Foreign Freight Forwarders [3] & Brokers Association (NYFF), Consolidated Forwarders Intermodal Corp. (CONFICO), Puerto Rico Manufacturers Association, Truck Drivers Local Union Number 807 of the International Brotherhood of Teamsters, *et al.* (Teamsters Local 807), American Importers Association (AIA), Household Goods Freight Forwarders Association of America, Inc., and Commission Hearing Counsel.

After many months of hearings and the amassing of a voluminous record, Administrative Law Judge Charles E. Morgan issued his Initial Decision in which he found that the Commission had jurisdiction over the rules in issue and that such rules violated the sections of the Shipping Act as alleged.

Exceptions to the Initial Decision were filed by PRMSA anl CONASA. Replies thereto were submitted by Hearing Counsel, by the NVOCC's, and by National, NYFF, and CONFICO.

Oral argument was heard and these proceedings came before us for decision. While our decision in these proceedings was pending, the validity of the collective bargaining rules which underlie the tariff rules was challenged before the NLRB. The collective bargaining provisions called Rules on Containers were found to be in violation of the National Labor Relations Act by the NLRB and the ILA and NYSA were ordered to cease their implementation and enforcement. That finding was upheld [4] and the NLRB's order directed to be enforced by the Court of Appeals. The Supreme Court denied *certiorari*.[1]

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[1] The NLRB decision was served December 9, 1975. It was upheld by the Court of Appeals at 537 F.2d 706 (1976) and denial of *certiorari* was ordered by the Supreme Court at 429 U.S. 1040 (1977). The Supreme Court also denied rehearing by Order of February 28, 1977 (51 L.Ed.2d 589).

As a result of the NLRB's decision, PRMSA filed a tariff note providing that its tariff rules on containers would not be enforced pending a determination of the validity of the underlying collective bargaining rules by the proper court of law.[2] In light of this tariff note provision and the holdings of the various courts, by Order issued August 10, 1977, we discontinued these cases on the ground that the allegedly unlawful rules on containers published by PRMSA had been "effectively withdrawn" by it.[3] Following issuance of our Order of Discontinuance, petitions for reconsideration were filed.[4] On the basis of these petitions, we granted [5] reconsideration of the proceedings. Replies to the Petition for Reconsiderations were filed by Hearing Counsel and PRMSA.[5]

By Order on Reconsideration issued simultaneously with this Report and Order, we vacated our previous Order of Discontinuance and determined to issue a decision on the merits of the proceeding. As a result, we have, once more, reviewed the record of these cases and herewith serve our Report.

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[2] For a more thorough discussion of this tariff note, see our Order on Reconsideration issued this date.

[3] These rules were, in fact, specifically cancelled by notice in PRMSA's tariff effective November 6, 1977.

[4] Petitioners were:

1. National Customs Brokers & Forwarders Association of America, Inc., New York Foreign Freight Forwarders & Brokers Association, Inc., and Consolidated Freight Forwarders Intermodal Corp. (filing a joint petition);
2. International Association of NVOCC's; and
3. Hearing Counsel.

[5] Pursuant to rules applicable to proceedings of this vintage, no replies to the petitions were permitted until the request for reconsideration was granted. See 46 C.F.R. Sections 502.261 and 502.262 as provided prior to May 19, 1976.

Appendix B—Final Report and Order of Federal Maritime Commission

DISCUSSION

Many of the exceptions are merely reargument of positions taken before the Presiding Officer. Therefore some will not be discussed here. However, we have devoted a great deal of time and care to a thorough analysis and review of each exception in light of the record. If certain exceptions are not specifically discussed it is because, in each instance, we are of the opinion that the argument advanced was adequately analyzed and properly disposed of by the Presiding Officer.

In its exceptions, PRMSA merely adopted much of the argument propounded in brief by CONASA. In large part, these issues were adequately and properly treated by the Presiding [6] Officer. However, we are of the opinion that one issue so raised deserves further discussion here.

In support of its position that its tariff rules should not have been found to be unlawful as alleged, PRMSA cites the holding of the Commission in the *South Atlantic and Caribbean Line* (SACL) case (12 F.M.C. 237 (1969)). We wish, once and for all, to put to rest any attempt to apply the holding of that case to the rules at issue here. That case presented only two issues. The first was one of fact: did the refusal to handle certain cargo constitute a true embargo in the sense that the carrier was "physically incapable of handling the traffic"? The second issue was one of law: did the SACL "Embargo Notice" comply with the filing and notice requirement of section 2 of the Intercoastal Shipping Act? There was no allegation of any violation of sections 14, 16 or 18 of the Shipping Act or of section 4 of the Intercoastal Act in that case.

In the present case, PRMSA claims that pursuant to the holding in the SACL case, since the tariff rules at issue

here were properly filed under section 2 of the Intercoastal Act, they cannot be found to be unlawful as alleged. This is a clear non sequitur. We may readily agree that PRMSA filed its tariff rules properly in accord with section 2 of the Intercoastal Act and in consonance with the SACL case. However, the provisions of those rules, notwithstanding proper filing, can obviously, simultaneously, be unjust, unreasonable, and unduly and unreasonably prejudicial and disadvantageous.

[7] The exceptions of CONASA constitute, almost entirely, a reargument of its position before the Presiding Officer. We are of the opinion that the Presiding Officer also properly disposed of those issues again with qualifications.

CONASA has raised as an issue on exception, the alleged error of the Presiding Officer with respect to his findings of violations of sections 14 Fourth and 16 First. CONASA objects to what it characterizes as a "per se violation" concept. CONASA's allegation is two-pronged.

First, CONASA claims that the Presiding Officer erred in concluding that the ocean transportation service rendered by PRMSA is the same whether a given container is loaded or unloaded at the pier or at an offpier facility. CONASA maintains that such a view ignores essential terminal services performed by ILA longshore labor as part and parcel of the total transportation service rendered by PRMSA.

Second, CONASA challenges the conclusion of the Presiding Officer that the dissimilarity of treatment of shippers under the rules as shown in the record constituted a violation of sections 14 and 16 of the Act. It argues that to constitute a violation of the Act, such dissimilar treat-

ment must be undue or unjust—*i.e.*, unjustified by transportation factors. CONASA's position is, in essence, that the longshore services and the underlying collective bargaining agreement which regulates them are transportation factors which must be [8] considered with regard to alleged violations of sections 14 and 16. Those services and the underlying agreement which created the disparate treatment of shippers, upon implementation by the tariff rules, constitute, in CONASA's view, a transportation factor which justifies the inequality which it creates. This is a novel, and, in our view, a circular proposition. CONASA would have us accept the proposition that the factors which created the uneven treatment also sufficiently justify such treatment. We find this argument ingenious but unconvincing.

We are of the opinion that the rules published in PRMSA's tariff were properly found by the Presiding Officer to create an anomalous condition where shippers who are similarly situated in all other transportation respects, are treated decidedly differently. Further, we agree with the Presiding Officer that the existence or not of a collective bargaining agreement which *affects* but is not *a part of* the transportation aspects of a shipper's relationship with his carrier, need not be given overwhelming priority or weight as a transportation factor by which to justify dissimilarity of treatment. We may agree that such an agreement is a factor to be considered. However, there are other such factors. The mere existence of the collective bargaining agreement does not pre-empt those other factors or foreclose our consideration of them. For us to adopt the contentions of respondents would be tantamount to [9] an acknowledgment by us that a common carrier

by water or other person subject to our jurisdiction could escape our jurisdiction by the simple device of voluntarily (albeit with pressure from a union) entering into an agreement which obligates the common carrier to take actions which may be or are in clear violation of the Shipping Act. We do not view the impact of the National Labor Relations Act as permitting a common carrier to disregard entirely its statutory obligations when conducting and resolving labor/management negotiations.[6] We find that upon consideration of the transportation factors in the situation created by these rules, including the underlying ILA-CONASA agreement, the disparity of treatment under the rules is not adequately justified.

This is not an adoption of a "per se violation" concept. It is, rather, a simple acknowledgment by us that the record in this proceeding shows adoption and implementation of tariff rules which are unjust and unreasonable, and which are unduly and unreasonably prejudicial and disadvantageous because their effects are unjustified by transportation factors.

Additionally, on the theory that the rules at issue are lawful collective bargaining rules which are exempt from the strictures of the antitrust laws, and by extension, the [10] requirements of the Shipping Act, Respondents have throughout this proceeding argued the Commission's lack of jurisdiction over such rules. In advancing this argument, Respondents rely heavily on the Supreme Court's decision in *Volkswagenwerk Aktiengesellschaft* v. *F.M.C.*, 390 U.S. 261, 19 L.Ed. 2d 1090, 88 S.Ct. 929 (1968) (Volks-

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[6] *Local 1976, United Brotherhood of Carpenters v. Labor Board*, 357 U.S. 93 (1958); *Galveston Truck Lines* v. *Ada Motor Lines, Inc.*, 73 M.C.C. 617 (1957).

wagen). We find that case unpersuasive with respect to the question of this Commission's jurisdiction over the rules here at issue.[7]

In Volkswagen, the Court was confronted with a problem similar to that at issue here. In that case, the Pacific Maritime Association (PMA), an employer organization not unlike CONASA, had reached a "milestone agreement" with the International Longshoremen's and Warehousemen's Union (ILWU). By that agreement the ILWU agreed to the introduction of labor-saving devices and the elimination of restrictive work practices on the West Coast waterfront in return for PMA agreement to create a fund to mitigate the impact upon ILWU [11] employees of the labor-saving technological innovations. The fund created —the so-called "Mech" fund—was to be raised and the method of its raising determined by the PMA alone.

The method used to raise this fund allegedly resulted in inequities borne by Volkswagenwerk Aktiengesellschaft, one shipper who supported the fund. It, therefore, refused to pay the assessments levied upon it with predictable loss of revenue to the fund.

Volkswagen obtained a stay of the court proceedings which followed in order to permit this Commission to exercise its jurisdiction and to determine certain issues. Those issues were:

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[7] We note in this regard the recent decision of the Supreme Court in *Federal Maritime Commission, et al. v. Pacific Maritime Association, et al.*, —— U.S. ——, March 1, 1978, with respect to requisite filing with and pre-implementation approval by the FMC of certain collective bargaining agreements which impose terms controlling or affecting competition upon employers who are not members of the multi-employer bargaining unit.

1. whether the assessments against Volkswagen were claimed pursuant to an agreement required to be filed with the Commission pursuant to section 15 of the Shipping Act, which agreement had not been filed with or approved by the Commission;

2. whether the assessment subjected Volkswagen to undue or unreasonable prejudice or disadvantage in violation of section 16 of the Shipping Act; and

3. whether the assessment method constituted an unjust and unreasonable practice in violation of section 17 of the Shipping Act as to Volkswagen.

The Commission found against Volkswagen and dismissed the complaint. The Court of Appeals affirmed the Commission. However, thereafter the Supreme Court reversed the Court of Appeals.

[12] A majority of the Court found that the assessment formula (as distinct from the agreement to set up the fund) was subject to the filing and approval requirements of section 15 of the Shipping Act. As such, the assessment agreement was to be filed with the Commission under that section. In the Commission's deliberations of this agreement, the Court concluded, the Commission would also have to take into consideration the alleged violations of sections 16 and 17. Therefore, the Court did not reach the merits of the sections 16 and 17 claims, and remanded the case to the Commission for further proceedings.

In a dissent, Mr. Justice Douglas urged that "to require the funding part of maritime collective bargaining agreements to receive prior approval from the Maritime Commission . . ." was an unwise decision. He feared that such advance approval by the Commission would "partially

paralyze" collective bargaining. Additionally, Douglas stated:

> I believe the Court has misconstrued section 15 of the Shipping Act, 1916; and I fear that its erroneous construction will cause serious disruption in the process of collective bargaining in the maritime industry. If the tariff extracted from [Volkswagen] is discriminatory or unreasonable, sections 16 and 17 of the Shipping Act provide a remedy.

Mr. Justice Harlan, in his separate concurring opinion, took issue with Douglas. Harlan stated:

> [13] . . . he [Douglas] suggests that a proper accommodation between "labor" and "competition" interests can be reached by exempting both labor agreements and labor-related agreements from the filing requirements of section 15 but leaving them subject to the specific prohibitions of the antitrust laws and sections 16 and 17 of the Shipping Act.
>
> This suggested accommodation appears to me demonstrably wrong. In the first place, as the Court notes, the filing requirement of section 15 was drafted broadly, and the filing-and-approval process includes review of questions arising under sections 16 and 17, and specifically creates an exemption from antitrust attack.

As may be seen, the Harlan position, which is used repeatedly before us in an attempt to support the antitrust exemption and the exemption from the Shipping Act of the rules involved here simply does not support that conten-

tion. Harlan's position is addressed to agreements which should receive advance approval under section 15, and concurrent sections 16 and 17 scrutiny. We have no such agreement at issue here. What we have here is merely the unilateral implementation of a rule founded in a collective bargaining agreement.

One collateral matter addressed by the Presiding Officer needs to be disposed of although it may have been rendered moot by the passage of time. In his Initial Decision, the Presiding Officer found that, while the rules at issue violate the Shipping Act and the Intercoastal Shipping Act, any hastily effected order in the nature of a cease and desist order might precipitate interference with the ocean commerce involved which may be to the detriment of the public interest. As a result, [14] the Presiding Officer determined that in the absence of review by us or exceptions, the effective date of any order requiring cancellation of PRMSA's offending tariff rules should be deferred for three months.

While we are amenable to deferring the effective date of the cease and desist order entered herein, we believe that the three months recommended by the Presiding Officer is unjustifiably long. We believe 30 days is sufficient time to allow Respondent to order its affairs and conform its tariffs, if necessary.

THEREFORE, IT IS ORDERED, That, except to the extent noted above, the Initial Decision issued in this proceeding is hereby adopted as our own and made a part hereof; and

FURTHER, IT IS ORDERED, That, within 30 days from the date of service of this Report and Order, Puerto Rico Maritime Shipping Authority shall cancel the tariffs found unlawful herein; and

FINALLY, IT IS ORDERED, That this proceeding be discontinued.

By the Commission.

/s/ FRANCES C. HURNEY
Frances C. Hurney, *Secretary*

APPENDIX C

Initial Decision of Federal Maritime Commission Administrative Law Judge

[1]

Federal Maritime Commission
Served October 9, 1975
Exceptions Due 10-24-75
Replies to Exceptions Due 11-7-75

FEDERAL MARITIME COMMISSION

No. 73-17

SEA-LAND SERVICE, INC. and GULF PUERTO RICO LINES, INC.—PROPOSED RULES ON CONTAINERS

No. 74-40

PUERTO RICO MARITIME SHIPPING AUTHORITY—PROPOSED ILA RULES ON CONTAINERS

Found (1) that the Federal Maritime Commission has jurisdiction over the tariff rules on containers of the Puerto Rico Maritime Shipping Authority (PRMSA), an ocean common carrier in the trade between ports on the East and Gulf Coasts of the United States, and ports in Puerto Rico; (2) that the present tariff rules on containers of PRMSA are unlawful under the Shipping Acts; and (3) that the public interest in its overall aspects necessitates that the effective date of an order requiring the cancellation of PRMSA's tariff rules on containers be deferred for three months, so that PRMSA in the meantime may determine and publish new tariff

rules on containers, which are lawful under the Shipping Acts, and which are consistent with overall aspects of the public interest, including the preservation of a steady flow of ocean-borne commerce of the United States between the East and Gulf Coasts and Puerto Rico.

Mario F. Escudero and *Edward J. Sheppard* for respondent the Puerto Rico Maritime Shipping Authority and for intervener the Commonwealth of Puerto Rico.

Gerald A. Malia, Brian P. Murphy, and *Thomas D. Shea* for respondents Sea-Land Service, Inc., and Gulf Puerto Rico Lines, Inc.

C. P. Lambos, Francis A. Scanlan, Donato Caruso, and *Jacob Silverman* for intervener Council of North Atlantic Shipping Associations.

Raymond P. deMember and *H. Neil Carson* for intervener International Association of NVOCCs.

Gerald H. Ullman for interveners and complainants National Custom Brokers and Forwarders Association of America, Inc., New York Foreign Freight Forwarders and Brokers Association, Inc., and Consolidated Forwarders Intermodal Corp.

Rafael Cebollero for intervener Puerto Rico Manufacturers Association.

J. Warren Mangan for intervener Truck Drivers Local Union Number 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[2] *Samuel Frankel* for intervener and complainant American Importers Association.

Alan F. Wohlstetter and *Ernest H. Land* for intervener Household Goods Forwarders Association of America, Inc.

Appendix C—Initial Decision of Federal Maritime Commission Administrative Law Judge

Donald J. Brunner, Charles L. Haslup, III, Marilyn J. Goldsmith, and ***Martin F. McAlwee*** as Hearing Counsel.

INITIAL DECISION OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE[1]

The Issues and Their Significance

These *two consolidated proceedings are investigations* of the lawfulness *of certain tariff rules*[2] on containers in the Puerto Rican trade between ports on the East and Gulf Coasts of the Continental United States (mainland), on the one hand, and, on the other, ports in Puerto Rico. The present tariff rules are applicable at North Atlantic ports, Maine to Hampton Roads, inclusive, South Atlantic ports, Charleston, S.C., and Jacksonville, Fla., and at a Gulf port, New Orleans, La.

In the first of the two investigations herein, the tariff rules were those of the original two respondents, two ocean common carriers, Sea-Land Service, Inc. (Sea-Land), and Gulf-Puerto Rico Lines, Inc. (GPRL). As *now in issue, the tariff rules are those of* the present respondent, an ocean common carrier, *the Puerto Rico Maritime Shipping Authority* (PRMSA), which is an instrument of the government of the Commonwealth of Puerto Rico.

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[1] This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission. Rule 13(g), Rules of Practice and Procedure, 46 CFR 502.227.

[2] On brief one party insists that the issue herein involves "work preservation rules," rather than tariff rules. If these tariff rules were merely work preservation rules, affecting only employers of longshoremen and the longshoremen, but not affecting shippers, there would have been no need to place these rules in a tariff of an ocean common carrier subject to regulation under the Shipping Acts.

Appendix C—Initial Decision of Federal Maritime Commission Administrative Law Judge

The second or present investigation began on September 13, 1974, although PRMSA did not begin operating as an ocean common carrier until [3] October, 1974, when it took the place of the main former operators in the Puerto Rican trade, Sea-Land, GPRL, Seatrain Lines, Inc. (Seatrain), and Transamerican Trailer Transport, Inc. (TTT) PRMSA then adopted the tariff rules on containers formerly in the tariff of Sea-Land. PRMSA's present tariff rules on containers substantially are unchanged. PRMSA feels that much of the history of, and justification for, these tariff rules on containers preceded PRMSA's entry into the Puerto Rican trade (the trade).

Hearing in the second investigation was delayed for a time in order for PRMSA, and its new management, to get oriented to the many problems facing a new operator in the trade, and to permit PRMSA to examine its tariff rules on containers and possibly to revise them. No substantial revision resulted. Hearing was held in Washington, D.C., and was concluded on May 7, 1975. The final briefs of the parties were served on August 12, 1975.

The tariff rules in issue place certain restrictions on the movement of cargo in containers over mainland waterfront facilities, generally when such containerloads come to or from points within 50 miles of mainland ports. *In particular instances these tariff rules require some container cargoes to be "stripped,"* or unloaded, *from one container, and "stuffed" or "restuffed,"* or loaded or reloaded, *into another container* at the waterfront facilities (the piers). At the same time under the tariff rules certain *other containerloads may be handled* across the same mainland waterfront facilities *without the stripping and restuffing.*

Yet, as to the ocean transportation service provided there is no difference between the containers which move freely and those which do not move freely. In other words, while PRMSA's ocean carrier service is the same, one containerload moves without restriction and another containerload is restricted.

This stripping and restuffing of some containerloads at the mainland waterfront facility, before ocean carriage to Puerto Rico, ostensibly *is* [4] *required by so-called "work preservation rules," but not by any recognized or legitimate transportation need.* The work preservation rules, which apply in this Puerto Rican trade and which also apply in many world trades, subject the ocean carriers to a penalty of $1,000 per container with regard to those containerloads of cargo which have not been stripped and restuffed in contravention of the work preservation rules.

The work preservation rules (see Exhibit 95 for example) and PRMSA's tariff rules on containers (see Exhibit 51) are alike in many respects. The work preservation rules and tariff rules differ in at least one important respect, in that only the tariff rules require the shipper or consignee to be liable to the ocean carrier for the penalty of $1,000 per container.

PRMSA, as was also the case with Sea-Land, feels that it cannot afford the work preservation rules' $1,000 penalty per container, and accordingly has chosen to pass the penalty (called "liquidated damages" in both the work preservation rules and in the tariff rules) on to its shippers in the form of its (PRMSA's) tariff rules on containers. The PRMSA tariff rules' $1,000 penalty applies to a shipper in instances where it is determined that the shipper "evaded" the stripping and stuffing requirement. A shipper, con-

signee, consolidator, forwarder, or deconsolidator may not evade the requirements of these tariff rules on containers by subterfuge, improper documentation, etc., but said shipper is not subject to the $1,000 penalty if he chooses to have the ocean carrier strip the container and restuff the cargo at the ocean carrier's waterfront facilities, where deep-sea longshore labor is used for this purpose.

The above stripping and restuffing constitute a substantial cost to the ocean carrier, and PRMSA considers that this cost compels it, in turn, to place charges therefor in its tariff. PRMSA's "transfer charge" for the stripping and restuffing is $150 for a 35-foot container and $175 for a 40-foot container, in connection with its [5] freight-all-kinds (FAK) rate on containers. Needless to say, a shipper, who already has gone to the expense of stuffing a container at a point away from the waterfront facilities, is not happy to be faced with the additional PRMSA transfer charge for the stripping of that container and the restuffing of the contents by the ILA at the waterfront facilities, before the cargo is ocean-borne to Puerto Rico.

If the shipper, forwarder, or consolidator chooses not to be subjected to the $1,000 penalty by incurring the extra expense (transfer charge) for the second handling of the contents of his container before it is ocean-borne, said shipper also would be concerned with possible delays, losses, or damages related to the second handling. Of course, under ideal circumstances the shipper wants his cargo stuffed only once and he does not want to be subjected to any penalties for "evading" a second handling of his cargo.

The discussion above of the rules on containers in PRMSA's tariff largely relates to problems associated with

container cargoes going from the mainland, or southbound, to Puerto Rico. Commerce to and from Puerto Rico mainly is southbound, but there is a substantial northbound movement to the mainland from Puerto Rico. On the northbound movement of containers there are similar restrictive requirements in the tariff rules on containers, including certain warehousing requirements which permit deconsolidation away from the piers without stripping and restuffing at the piers only if certain northbound cargoes are warehoused a minimum of 30 days. Many consignees and deconsolidators do not want their northbound cargoes stripped and restuffed at the piers, nor alternatively do they want to be subjected to the 30-day warehousing expense.

The tariff rules permit some container cargoes, such as "manufacturer's label" stuffed by the manufacturer, and in most instances[1] [6] cargoes coming or going to points more than 50 miles from a port, to cross mainland waterfront facilities without further stripping or stuffing.

The alleged unlawfulness comes about because the same tariff rules concurrently require the second stuffing or stripping of other container cargoes, such as cargoes coming from consolidators or going to deconsolidators located within 50 miles of a port. The second stuffing or stripping and other requirements of the container rules are alleged to be unjustly discriminatory and otherwise unlawful, among other reasons, because the tariff rules treat similar (from-a-transportation-viewpoint) shippers differently and

[1] The "work preservation rules" have been interpreted, and in turn the tariff rules on containers have been interpreted, to require cargoes outside of a 50 mile radius to be stripped and restuffed if a consolidator, etc., were to move his consolidation point from within 50 miles to another point outside of a 50 mile radius of a port so as to "evade" the rules on containers.

because the tariff rules themselves allegedly are vague, uncertain, and unreasonable.

Besides the lawfulness of these tariff rules, another principal issue is the jurisdiction of the Federal Maritime Commission. Intervener, the Council of North Atlantic Shipping Associations (CONASA), contends that the attack by shippers on the tariff rules is in reality an attack on traditional work preservation rules or agreements known as the "Rules on Containers." These work preservation agreements are made between International Longshoremen's Association AFL-CIO (ILA), on the one hand, and, on the other, certain shipping associations, such as for example, the agreement between the Atlantic Coast District of the ILA and CONASA.

In brief, three matters must be decided herein. (1) whether the Federal Maritime Commission (FMC or Commission) *has jurisdiction*; (2) if the FMC has jurisdiction, *whether the tariff rules on containers are* unjustly discriminatory, unduly prejudicial or otherwise *unlawful;* and *(3)* if the FMC has jurisdiction and if the tariff rules on containers are unlawful, *what kind of order should be issued,* including the timing of such order.

The significance of any order of the FMC herein cannot be minimized. It is alleged by CONASA that any order, prohibiting a single ocean [7] carrier from including in its tariff the "Rules on Containers" in the Puerto Rican trade, would invite all ocean carriers in many world-wide trades to breach their contractual obligations to abide by these so-called work preservation agreements, and thereby upset practices and labor agreements of long duration. PRMSA fears an ILA shutdown if PRMSA is required not to follow the ILA's Rules on Containers. The various complainants

and shipper interests herein fear dire consequences to United States trade and to themselves unless the Commission finds the tariff rules on containers to be unlawful and promptly orders their cancellation. Hearing Counsel state that the issues are of monumental importance, and that unlike any other case now before the Commission, the issues involve a direct challenge to the viability of the Commission, and the regulatory mandates which it has insisted upon and enforced for many years.

It would seem that we must not only do justice to the various parties, particularly the shippers and consignees, but also we must consider the general public interest in fostering and maintaining a merchant marine consistent with maintaining the national defense and developing the foreign and domestic commerce of the United States through ocean shipping services which will provide steady flows of ocean commerce. In particular, we must assure a steady flow of ocean commerce to and from Puerto Rico.

THE ORDERS OF INVESTIGATION AND OTHER ORDERS

The *first proceeding, No. 73-17,* arose from the Commission's *order of investigation and suspension served April 13, 1973.* Therein Sea-Land and GPRL were named respondents, these respondents' proposed tariff rules on containers were suspended to and including August 13, 1973, and placed under investigation pursuant to section 22 of the Shipping Act, 1916 (1916 Act), and sections 3 and 4 of the Intercoastal Shipping Act, 1933 (1933 Act). It was ordered that determinations be made pursuant to [8] sections 14 Fourth, 16 First, and 18(a) of the 1916 Act, and section 4 of the 1933 Act, as to whether there would be unfair or unjust discrimination against any shipper in the

matter of cargo space accommodations, as to whether any particular person, locality, or description of traffic would be subjected to any undue or unreasonable prejudice or disadvantage, and as to whether the proposed tariff rules are just and reasonable.

By *first supplemental order* in No. 73-17 *served August 10, 1973,* the Commission placed under investigation certain revisions of Sea-Land's tariff rules on containers, and noted in this order that the proposed changes were protested by the Commonwealth of Puerto Rico (Commonwealth)[4] and by the International Association of NVOCCs (the NVOCCs).

On *August 28, 1973,* the Commission served its *order* in No. 73-17, *denying the motion to dismiss* filed June 11, 1973, by intervener CONASA. CONASA had urged that the FMC lacked jurisdiction over the subject matter of the proposed Rules on Containers and over the administration and interpretation of these rules, since CONASA claims that these are work preservation rules and part of the collective bargaining process, that these are matters covered by the National Labor Relations Act under the jurisdiction of the National Labor Relations Board (NLRB) and the courts, and that FMC jurisdiction would have a devastating effect on labor relations in the maritime industry, and impinge on labor peace, etc.

The Commission concluded that it was not persuaded to overrule the ruling issued on June 27, 1973, of the Admin-

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[4] The Commonwealth, as a protestant, was represented in the first investigation by the same counsel, who also represented PRMSA, as the respondent in the second investigation. Since PRMSA is an instrument of the Commonwealth, the Commonwealth has been in both investigations, but has changed from opposition to support of the tariff rules.

istrative Law Judge, wherein he had denied the motion to dismiss, on the grounds generally that the proposed Rules on Containers imposed terms which affected persons other than the collective bargaining parties and that the proposed rules [9] apparently will have a substantial effect on the obligations of ocean common carriers to the shipping public. On brief, CONASA continues to assert that the FMC lacks jurisdiction.

By *order served September 26, 1973,* the Commission *denied the petition* of the NVOCCs filed on July 12, 1973, *for enforcement of the Commission's order of April 13, 1973.* Sea-Land had taken the position that no finding then could be made that Sea-Land was in violation of the Shipping Acts until after a full hearing. The Commission stated that no action to enforce suspension in connection with the first investigation herein could be maintained at the time (September 26, 1973) since such enforcement could only take the form of an extension of the suspension period, a form of relief which the courts and the Commission cannot grant.

The second proceeding, No. 74-40, arose from the Commission's *order of investigation and suspension served September 13, 1974.* Therein PRMSA was named respondent, the American Importers' Association, Dolphin Forwarding, Inc., the National Customs Brokers and Forwarding Association of America, Inc., the New York Foreign Freight Forwarders and Brokers Association, Inc., and Consolidated Forwarders Intermodal Corporation, Inc., were named complainants. (Some of these complainants had previously intervened in the first investigation herein.) The order of September 13, 1974, also provided that PRMSA's tariff rules on containers be suspended to and including January 15, 1975.

Appendix C—Initial Decision of Federal Maritime Commission Administrative Law Judge

But, by a further *order issued September 23, 1974,* in Docs. 73-17 and 74-40, the Commission stated upon further consideration it became convinced that *suspension of these tariff rules on containers would not be in the public interest,* and it decided to allow the subject tariff matter of PRMSA to become effetive while this investigation was conducted, and accordingly *the Commission vacated the said suspension.*[5] [10] While the order of September 23, 1974, did not elucidate what specific matters of public interest were the basis of the order, presumably there was concern about the continuance of a steady flow of ocean commerce to and from Puerto Rico, a matter which apparently was one of the concerns of PRMSA when it adopted its tariff rules on containers. The investigation, but not the suspension, provided for in the order of September 13, 1974, remains in effect.

The Commission stated in its order of September 13, 1974, that generally PRMSA's tariff rules on containers provide that, at Atlantic Coast ports, consolidators including NVOCCs who operate facilities within 50 miles of a port will be furnished no containers where that would be contrary to these tariff rules, and that any containers which may come from them shall be stripped at the pier and the

[5] The order of the Commission served September 13, 1974, provided that there be a hearing before an Administrative Law Judge at a date and place determined by him, and that he submit an Initial Decision no later than November 15, 1974; but the Commission's further order served September 23, 1974, deleted the requirement that an Initial Decision be rendered no later than November 15, 1974, and the presiding Administrative Law Judge was "urged to expedite these proceedings within the limits of his discretion and due process." These proceedings have been handled with expedition within the limits of due process in accordance with the general policy for all proceedings of similar magnitude and import.

cargo placed (stuffed) into another container; also that at New Orleans, there is no prohibition against the furnishing of containers by the ocean carrier to consolidators, but that the stripping and restuffing provisions apply, and also that at all ports, these tariff rules would permit the carrier to pass along to the shipper fines or liquidated damages assessed against the carrier for violations of these tariff rules on containers, if the violation were caused by evasion, subterfuge, oversight or other action by the shipper.

The Commission also stated in this order that certain notes to items 15940 and 18880 of PRMSA's tariff made PRMSA's Freight-All-Kinds [11] (FAK) rates subject to its tariff rules on containers, and that Note 7 to item 15940 and note 6 to item 18880 provide that where the carrier is required by a collective bargaining agreement to strip and stuff, a shipper may bring his FAK cargo to the pier in his own trailer (container), where it will be placed into the carrier's container, or vice versa, for a fee, depending upon the size of the container, and that the shipper will then obtain the FAK rate. The Commission ordered an investigation of notes 6 and 7 of item 15940 and of notes 5 and 6 of item 18880.

The Commission order in No. 74-40 that determinations be made pursuant to sections 14 Fourth, 16 First and 18(a) of the 1916 Act, and section 4 of the 1933 Act as to whether there would be unfair or unjust discrimination against any class of shippers in the matter of space accommodations or or other facilities, as to whether certain consolidaters or certain consolidated cargo would be subjected to undue or unreasonable prejudice or disadvantage, and to whether the subject tariff rules are unjust and unreasonable. The Commission's order consolidated No. 74-40 with No. 73-17

and provided that the record already compiled in No. 73-17 be utilized to the maximum extent possible to develop the issues in No. 74-40.

By First Supplemental Order served March 14, 1975, in Nos. 73-17 and 74-40, the Commission stated that on February 14, 1975, PRMSA filed amendments to become effective March 16, 1975 (issue date of tariff February 11, 1975), setting forth new tariff rules on containers, which appeared to be based upon the collective bargaining agreements with the ILA for the period October 1, 1974, to September 30, 1977. The Commission noted that while the form of the rules is considerably different the substance of these tariff provisions appeared to be generally unchanged. The Commission ordered these PRMSA amendments to be made part of the investigation herein, as well as any other future change, amendment, or reissue of PRMSA's tariff rules on containers. This [12] order brought into issue specifically certain tariff pages listed in its appendix, including tariff rule 440 covering CONASA ports, rule 442.5 covering the South Atlantic ports of Charleston and Jacksonville, and rule 445, covering the Gulf port of New Orleans.

THE PARTIES AND THEIR GENERAL POSITIONS ON THE ISSUES

The *Household Goods Forwarders Association of America, Inc.*, an intervener, expressed its concern as to whether non-military or commercial shipments of household goods would be exempt from the stripping and stuffing requirements of the tariff rules on containers. By order served January 16, 1974, the Commission ruled that non-military, as well as military, shipments of household goods are not subject to the stripping and stuffing requirements, as stated on page 2 of the order served April 13, 1973. Accordingly,

this intervener withdrew from active participation in the proceeding.

Sea-Land and GPRL. At the first prehearing conference, reference was made to the presumed fact that all ocean carriers serving the Port of New York in almost all cases abided by their collective bargaining agreements with the ILA. This reference was made in particular with regard to the so-called ILA "Rules on Containers," but it also was stated that so far as was known only Sea-Land and GPRL placed what these two ocean carriers deemed to be corresponding and appropriate rules on containers in their tariffs. Apparently, the ocean carriers in other trades in many or mostly all instances complied with their agreements with the ILA as to the ILA's "Rules on Containers," but did not elect to publish in their tariffs corresponding rules on containers. In time, Sea-Land and GPRL were succeeded in the trade herein to and from Puerto Rico by PRMSA, with the result that *Sea-Land* and *GPRL* canceled their tariffs in this trade and *were dismissed as respondents* at the hearing on April 29, 1975.

[13] Some of the principal features of the Puerto Rican trade herein were that, one, it was the first trade to use the container method of ocean transportation extensively, and, two, the consolidation of less-than-container loads into container loads was prominent in this trade. Because of these features of this Puerto Rican trade apparently the ILA tended to focus a great deal of its attention regarding the enforcement of its "Rules on Containers" on this trade, rather than on other trades.

PRMSA, the remaining respondent, states that it is caught in a dilemma, that it is aware of the injustices which the strict application of the container rules has brought

upon segments of the shipping industry, but that PRMSA must abide by the ILA container rules if it is to serve Puerto Rico from the East and Gulf Coast mainland ports, that PRMSA cannot absorb the $1,000 per violation penalties, much less expose itself to a possible ILA shut-down, and that under the circumstances it must be found that the tariff rules on containers of PRMSA are not unlawful under the Shipping Acts.

PRMSA's plaint reflects a prior comment made when PRMSA was not a party. At the first prehearing conference, counsel for CONASA had commented that Sea-Land was caught between Scylla and Charybdis. At that time Sea-Land's and GPRL's tariff rules on containers were under suspension, and counsel for CONASA asked whether these ocean carriers should obey the FMC[6] and fall into violations perhaps of their collective bargaining agreement, or should these ocean carriers obey their collective bargaining agreement and not pay attention to requirements of the FMC.

CONASA is the principal party supporting the tariff rules, and in fact CONASA, not PRMSA, assumed the main defense of these rules. But [14] actually CONASA supports these rules not so much as tariff rules, but primarily as legitimate work preservation rules of ILA, or as agreements between the ILA and the various shipping associations, and subject not to the jurisdiction of the FMC, but to the jurisdiction of the National Labor Relations Board.

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[6] That is, permit the relatively free movement of container cargoes across the mainland waterfront facilities without stripping and stuffing at the piers, because the restrictive tariff rules on containers then were under suspension by the FMC.

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The ILA did not become a party.[7] Nevertheless, considerable evidence was offered and received as to the developments of the ILA's Rules on Containers, and the reasons for such rules, as background necessary to the development and interpretations of the tariff rules of Sea-Land and GPRL, and of PRMSA in issue herein. Under the circumstances, and in view of the substantial record made,[8] it is concluded that the existing record is ample to reach the conclusions and findings required by these investigations.

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[7] In the first proceeding, No. 73-17, Hearing Counsel procured numerous subpenas, including, a subpena issued on June 4, 1973, directing the deposition of the president of the ILA. Said subpena was served on the office manager of the ILA's office at 17 Battery Place, New York, N.Y. An attorney for the ILA indicated to Hearing Counsel that he had received personally the subpena directed to the ILA's president, and was contemplating the filing of a motion to quash, but had not had an opportunity to discuss it with the ILA's president. The matter was dropped and no further action was taken by any party to secure the oral testimony of the President of the ILA, but two affidavits, dated April 19, 1974, and May 6, 1974, submitted by him in an NLRB proceeding, were received into the record of No. 73-17 as CONASA rebuttal exhibits, and in accordance with the agreement of all parties, there was no oral examination or cross-examination of the ILA's president on his affidavits. Nor was there oral examination or cross-examination in the present proceedings before the Administrative Law Judge of numerous other persons who made statements on both sides of the issues herein. These statements also became exhibits in the present record. The agreement of all parties to waive cross-examination of numerous witnesses and to accept their written testimony as exhibits greatly shortened the time and expense of the hearing.

[8] The large record consists of 1311 pages of transcript, and 95 exhibits. Many exhibits are depositions, some consisting of hundreds of pages. Some exhibits are parts of the record in the proceeding, *Balicer* v. *International Longshoremen's Association and New York Shipping Association*, 364 F. Supp. 205 (D.N.J. 1973) (73 Civ. 1155) affirmed without opinion, 491 Fed. 2d 748 (3d Cir., 1974).

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[15] The *National Custom Brokers & Forwarders Association of America, Inc.* (National Association), the *New York Foreign Freight Forwarders & Brokers Association, Inc.* (New York Association), and *Consolidated Forwarders Intermodal Corp.* (Confico), all of whom have their principal offices in the City of New York, oppose the tariff rules on containers. These parties contend that PRMSA's rules operate to the detriment of United States exporters, are harmful to United States importers, are unduly restrictive to NVOCCs, consolidators, and ocean freight forwarders, and are harmful to ports, warehousemen, terminal operators and to United States flag carriers.

The non-vessel operating common carriers (*NVOCCs*) contend that previously, under rules and practices applicable to all shippers the NVOCCs were able to obtain containers (to be taken away from the piers) pursuant to the FAK tariff provisions of the ocean carriers in the Puerto Rican trade, that NVOCCs were able to load (stuff) containers at their own facilities, and deliver these containers to the ocean carriers at the port where these containers were loaded aboard vessels without stripping and restuffing. The NVOCCs also contend that they were able to receive loaded containers on return shipments without stripping and storage at the piers, which containers were unloaded (stripped) and distributed at the NVOCCs' own facilities. But, now the NVOCCs, under present PRMSA tariff rules on containers, allegedly economically in effect are embargoed from obtaining and using PRMSA's FAK tariff provision, with the result that several NVOCCs have been forced out of business. The NVOCCs contend that the ILA is using featherbedding practices to prevent the ocean carriers such as PRMSA from providing services to those

persons, such as the consolidators and NVOCCs, which the ILA does not want the ocean carriers to serve.

The *American Importers Association* opposes the tariff rules on containers. The continued existence and operation of deconsolidators of container loads is of great importance to importers and especially [16] to small firms. Distinctions in the tariff rules on containers as to whether or not an importer operates within 50 miles of a port, or imports goods in containers consolidated with cargo for other importers, or transfers title to merchandise within a 30-day warehousing period, etc., are unlawful in the view of these importers.

Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 807, IBT) also opposes the tariff rules on containers in order to preserve teamster jobs. This teamster union contends that there are import-export warehouses which have been customarily manned by Teamsters, and that these warehouses regularly received containers from CONASA ports without restrictions prior to the so-called ILA-CONASA Dublin conference in February, 1973. The Teamsters contend that if the tariff rules on containers are permitted to exist the import-export warehouses in the geographic area of CONASA ports will have to go out of business and thereby deprive Teamsters of jobs.

Hearing Counsel insist that PRMSA's tariff rules on containers are unlawful and should be ordered stricken from the tariff, and furthermore that PRMSA should be prohibited from engaging in the unlawful practices ostensibly permitted by the provisions of these tariff rules on containers. Hearing Counsel state that the Shipping Act

was not drafted by Congress in 1916 to possess the qualities of a chameleon and to change colors to suit the contractual or economic needs of private parties. Hearing Counsel state that the issues focus on the question of whether persons subject to the FMC's jurisdiction will pattern their business practices on the regulatory mandates of the Shipping Acts, or whether such practices will be forged solely in the collective bargaining arena.

THE WORK PRESERVATION RULES

CONASA is an unincorporated association. Since 1971, it has negotiated collective bargaining agreements with the ILA on a master contract [17] basis concerning the North Atlantic or CONASA ports of Boston, Providence, New York, Baltimore and Hampton Roads. CONASA has acted on behalf of its six member associations, the Boston, the Rhode Island, the New York and the Hampton Roads Shipping Associations, the Philadelphia Marine Trade Association, and the Steamship Trade Association of Baltimore. The six shipping associations individually negotiate labor agreements with the ILA covering local conditions excepted from the master contract. The members of these six associations include ocean common carriers, stevedores, terminal operators and others functioning in waterfront related activities. Besides CONASA, there are multi-employer bargaining associations for the South Atlantic and Gulf Coasts. For the ports of Charleston, S.C., and Jacksonville, Fla., the South Atlantic Employers Negotiating Committee negotiates with the ILA. For the Port of New Orleans, La., the New Orleans Steamship Association negotiates with the ILA.

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Of the three multi-employer bargaining associations, only CONASA intervened, and as a result the evidence largely relates to the situation at CONASA ports, and in particular to the situation at the Port of New York.[9]

[18] The Rules on Containers are a compromise between the shipping industry (ocean common carriers, stevedores, terminal operators, et al.) and the ILA. The compromise enables the shipping industry to enjoy the benefits of innovation, particularly the handling of cargoes in containerloads over the piers, by the relatively free movement of an estimated 80 percent of the containers across the piers, while preserving to the longshoremen of the ILA some part of their traditional work jurisdiction.

As recently as the first three weeks of March 1975, out of the total average PRMSA weekly movement of 1,373 containers southbound in this trade, 1,140 containers, about 83 percent, crossed the piers without ILA rehandling of their contents.

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[9] Problems concerning the ILA's work preservation rules are not confined to the Port of New York. Notice is taken that as recently as September 19, 1975, U. S. District Judge Robert R. Merhige, Jr., denied a temporary injunction against the ILA and the Hampton Roads Shipping Association (HRSA) sought by the NLRB to bar fines imposed by the ILA and HRSA Joint Grievance Committee on Containers on steamship lines whose containers were stripped in the port area by truckers. Fines totalling $10,000 were imposed in 1974 on United States Lines when certain truckers had stripped ten containers. When United States Lines was unable to recoup the fines from the truckers, it canceled its agreements with the trucking firms, and one result was that the Tidewater Motor Truck Association filed an unfair labor charge against the ILA and HRSA. Judge Merhige cited the ILA's work preservation rule 1(a)(3) which provides that ILA deepsea labor shall strip cargo from containers designated for a single consignee from which the cargo is discharged (deconsolidated) by other than its own employees within the geographic area.

Out of the other 233 containerloads per week, PRMSA consolidated 136 containers with LTL or LCL components at the piers; 26 containers of NVOCC cargoes were stripped and restuffed by PRMSA; and 71 containers of NVOCC cargoes were not subjected to this further stripping and stuffing by PRMSA because of court injunctions obtained by two NVOCCs. Of course, this figure of 1,373 total weekly containerloads, does not take into account some containerloads shifted [from [sic] away from] the Port of New York to a South Atlantic port and shipped on an ocean common carrier which did not use ILA labor at the piers.

In the Port of New York, for example, in the contract year ending September 30, 1959, before containerization became of any substantial significance, there were over 30,000 longshoremen who worked 44.7 million man hours per year. For the contract year ending September 30, 1973, there were only about 13,000 longshoremen who worked only 22.6 million man hours per year.

In the view of CONASA if the work preservation rules now were to be nullified, there would be an estimated further loss of 3,000 longshore positions in the Port of New York, which CONASA believes would threaten the present uneasy longshore labor peace. The 1974-1977 ILA-shipping [19] industry labor contracts were reached without resort to strikes or work stoppages, an unusual event in the history of ILA labor contracts for the past 30 years. Both the longshoremen and the shipping industry are to be commended for reaching agreement without interruption to the steady flows of ocean commerce to and from the United States.

For many years before containerization, the longshoremen moved cargo over the piers piece by piece, and con-

tainerization posed a serious threat to ILA work opportunities. From time to time, as ILA labor contracts came up for renewal various compromises were reached between the ILA and the shipping industry. Generally in the bargaining sessions, before the agreements were reached, the ILA would insist on stuffing and stripping all containerloads at the piers, while the shipping industry would insist that no containerloads be stuffed and stripped at the piers. During the negotiations leading to the 1974-1977 labor agreement, these same goals of the ILA (stripping all) and of the shipping industry (stripping no containers) were again put forward, before the 1974-1977 "compromise" labor agreement was reached.

In the past the ILA and the shipping industry came to agreement on the ILA's Rules on Containers, which permitted many containers to move freely across the docks, and which restricted the free movement of other containers. There are certain containers which apparently always have moved freely across the docks without rehandling by the ILA, including household goods, mail, military effects, and coastwise and intercoastal containers (the latter two being considered marginal from a competitive standpoint with all-rail land movement).

The ILA apparently recognized that the container revolution was here to stay, by ceding that containers originating more than 50 miles from a port generally could move across the piers without rehandling by the ILA. In return for this and other concessions, the ILA obtained various benefits from the shipping industry such as better wages, vacation, health and retirement benefits, guaranteed annual income (GAI) [20] and container royalties. These royalties were intended as partial compensation to the ILA for

containers stuffed away from the piers by non-ILA labor. Nevertheless, even with GAI and container royalties, the ILA wanted to hold on to as many jobs as reasonably possible for its members, and the ILA did not want only make-work jobs, such as sweeping piers.

Although the ILA insisted on holding on to the right to stuff and strip local containers coming from or going to points within its local area, or within 50 miles of the ports, even in this so-called "geographic area" the ILA gave up further cargoes. It excepted from its handling requirements containers loaded with cargo at a qualified shipper's facility with its own employees and so-called manufacturer's label containers loaded by a single manufacturer at its facilities with its own employees. However, where the shipper did not use its own employees to load the container, the ILA under its Rules on Containers insisted on its right to strip and stuff the containers at the piers.

From time to time officials and members of the ILA checked certain stuffing and stripping operations of consolidators and deconsolidators located within 50 miles of the Port of New York. ILA officials were very irate when they found in 1962, for example, that certain consolidation work was being performed away from the piers by non-union labor at 90 cents per hour, which was less than the minimum wage.

The main remaining containerloads which the ILA now insists on stuffing and stripping at the piers are containers coming to and from NVOCCs, consolidators, forwarders, deconsolidators, and other shippers and consignees who do not use their own employees to load and unload their containers, where the containers come to or go from points within 50 miles of a port. The ILA considers that these

containerloads in reality consist of less-than-truckload (LTL) and less-than-containerload (LCL) cargoes, which the ILA insists must be consolidated and deconsolidated at the piers by longshoremen, thereby in the view of the ILA [21] continuing the work jurisdiction of the ILA over these LTL and LCL cargoes.

The NVOCCs, consolidators and deconsolidators in response, contend that the ILA should not restrict their containers, and let other containerloads pass relatively freely over the docks.

The teamsters are in disagreement with the ILA as to the work jurisdictions of the members of the two unions. There is a disclaimer in the ILA's Rules on Containers, which states, "That these rules do not have any effect on work which historically was not performed at a waterfront facility by deepsea ILA labor." This disclaimer does not satisfy intervener, truck driver's Local 807 IBT. This truck drivers' union fears that it will lose more jobs of its members, besides the estimated 2,500 jobs already lost in its view because of containerization.

Apparently, the ILA theoretically does not object to the stuffing and stripping by the Teamsters union of containers at locations within the 50-mile areas of port, such as at public warehouses or other points away from the piers. But, the practical problem between the ILA and the Teamsters arises because the ILA concomitantly insists on stuffing and stripping the same containers at the piers even when these containers also have been stuffed and stripped by the Teamsters away from the piers. Presumably, with regard to containers coming to and from areas outside of the 50-mile areas there is no problem, and the Teamsters or other non-ILA labor could stuff and strip these con-

tainers outside of the 50-mile areas without any corresponding insistence by the ILA that it should also stuff the same containers at the piers.

Perhaps, this is the reason that Local 807 IBT intervened rather than the general IBT union. In one of his affidavits the president of the ILA, chides the president of Local 807, IBT, because the latter failed to supply any affidavit of the former or present general presidents of the Teamsters. The president of the ILA insists that there was an inter-union agreement or understanding that all work performed within [22] the "compound" or waterfront ocean terminal, which covered the loading and stripping of containers on the piers and in the ocean terminals, and any and all work connected with the movement of cargo within such piers and terminals, was exclusively within the jurisdiction of the ILA.

The ILA's understanding of the inter-union agreement was that the jurisdiction of the Teamsters was to move the cargo to and from the compound. The ILA's view is that the Teamsters had no jurisdiction at the compound to consolidate or to deconsolidate containers. The president of the ILA states that his view was reaffirmed from time to time by the former and by the present general presidents of the Teamsters.

The president of Teamsters Local 807 insists that there was and is an inter-union agreement between the ILA and IBT that the unloading from trucks of all cargo for export is under the work jurisdiction of the Teamsters, and that the loading of import cargo on the trucks is divided between members of the IBT and of the ILA.

Some undisputed facts apparently are that the truck driver is the boss of, and is responsible for, any movement

or placement of cargo within his truck. The truck driver and his helper are responsible for unloading the cargo from the truck to a point adjacent to the truck tailgate. If and when at times, the truck driver further moved export cargo and placed pieces of cargo in specific bins or cribs or places of rest for export, such placement was made under the work jurisdiction of the longshoremen, even though to save the time of, and for the convenience of, the truckman, he did some of the placement work on the pier. The placement on the docks had to be under the supervision of an ILA checker or clerk.

While the Teamsters in the past have handled certain boxes and cartons of small proportions on the piers, the ILA always has taken the view that boxes eight feet or larger containing consolidated loads are subject to rehandling by the ILA at the waterfront. The ILA apparently, because of the nature of the cargoes or for general convenience in [23] clearing the piers, has loaded most of the import cargoes into the trucks, but the actual loading into the trucks and placement of pieces inside the truck is the responsibility and is under the supervision of the truckman.

In summation of the inter-union contentions insofar as they relate to the stuffing and stripping of consolidated containers, the ILA generally insists on work jurisdiction at the piers, and the IBT generally insists on work jurisdiction away from the piers. If the result were that both the ILA and the IBT were to stuff and strip the same container there would be no inter-union problem. But, the problems arise because it is too expensive for the shippers and consignees to have their shipments consolidated or deconsolidated twice. Some of the above statements and

findings of fact as to the work jurisdiction of the ILA and IBT may be both partially inaccurate and incomplete, but this matters not to the ultimate conclusions and findings herein.

Regardless of what is the complete and true situation and history as between the ILA and the IBT concerning labor jurisdiction to stuff and strip consolidated containers coming from or going to points within 50 miles of the ports, what we are faced with in these proceedings is that the ILA's Rules on Containers, in effect, have been adopted largely by PRMSA in its tariff rules on containers. And only PRMSA's tariff rules on containers are in issue herein.

The ILA's Rules on Containers were codified and placed into the October 1, 1968-September 30, 1971, collective bargaining agreement between the ILA and the New York Shipping Association (NYSA). But, it is the position of the ILA that these rules originated in the collective bargaining agreement effective October 1, 1959. Paragraph 8(c) of that agreement provided in connection with containers—Dravo[10] size or larger:

> [24] Any work performed in connection with the loading and discharging of containers for employer members of the NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

The ILA always intended that its work preservation rules be strictly enforced, and from time to time the ILA

[10] Dravo is 8 feet by 8 feet by 8 feet.

was assured by the ocean carriers and stevedores that these rules were being enforced. However, enforcement of these work preservation rules was relatively lax in earlier years. As time went on enforcement increased in intensity. NYSA on February 28, 1962, issued the following statement to the ILA:

> Where an employer member of NYSA supplies a container which is the property of such member, to a consolidator for loading or discharging of cargo in the port of Greater New York, it will be stipulated that such container must be loaded or unloaded by ILA at longshore rates.

From time to time the ILA complained to NYSA that certain ocean common carriers were not honoring the labor agreement as to the loading of containers by the ILA. In 1969, after a 57-day strike on this issue, the ILA obtained the rule in the collective bargaining agreement which imposed liquidated damages (then $250, now the $1,000 penalty) on ocean common carriers violating the Rules on Containers, as shown on page 69 of attachment 9 of Exhibit 5.

In 1973, the ILA demanded and obtained the so-called "Dublin Rules," which were designed to make violations of the Rules on Containers more difficult. In the 1974 CONASA-ILA negotiations, the Rules on Containers were revised and the Dublin Rules were incorporated therein. Nevertheless, even after the 1974-1977 Rules on Containers went into effect, the investigators for the ILA found that hundreds of containers were moving in violation of the Rules on Containers, and the ILA protested that the ocean

common carriers and stevedores were not living up to their bargain.

The present Rules on Containers in Rule 1(a)(1) provides that any container, whether owned, leased or used, by an ocean common carrier which contains a consolidated containerload, which comes from or goes [25] to any point within the 50 mile radius of a port shall be stuffed or stripped by ILA deepsea labor, subject to exceptions provided in the Rules. One key word in Rule 1(a)(1) is "used," which means that this rule covers not only ocean-carrier owned or leased containers, but also any container used or transported by the ocean carrier. This is a tightening of certain earlier Rules on Containers, such as the October 1, 1968, Rules, which listed only owned or leased containers.

On April 28, 1975, the ILA unilaterally (as permitted in the labor agreement) revoked the present Rules on Containers and implemented even more restrictive provisions. Later, the ILA agreed to reinstate the Rules on Containers effective May 30, 1975, provided that a Council of Container Carriers actively participated in the implementation and administration of these Rules. Such a Council was formed.

The NYSA-ILA Contract Board is charged with the implementation and administration in the Port of New York of the CONASA-ILA collective bargaining agreement and of the local collective bargaining agreement between NYSA and ILA. This same Contract Board also acts as the NYSA-ILA Container Committee to enforce and administer the ILA's Rules on Containers. This committee has employed Mr. Michael Nicholas as its contract administration officer to interpret, administer and police the enforcement of the Rules on Containers. His decisions are subject to hearing and review by the Contract Board, and when and

if there is a deadlock on the Contract Board, the dispute goes to final and binding arbitration under the labor agreement's grievance and arbitration provisions.

Mr. Nicholas has rendered certain decisions interpreting the ILA's Rules on Containers. His decisions are communicated to the ocean carriers. Up to the time Mr. Nicholas testified, May 1, 1975, all ocean carriers had accepted his decisions without any dispute. No party had insisted upon any review of Mr. Nicholas' decisions by the NYSA-ILA Container Committee.

Inasmuch as various persons from time to time have disagreed as to their interpretation of the ILA's Rules on Containers and the ocean [26] carriers have found it necessary to go to Mr. Nicholas for his interpretation, it follows that the ILA's Rules on Containers have not been entirely clear, and that to some extent they contain conflicting or ambiguous provisions. Since the ILA's Rules on Containers have been substantially copied on PRMSA's tariff rules on containers, it follows that the latter also are ambiguous and not clear on their face. Ambiguous tariffs are contrary to the requirements of the Shipping Acts, because tariffs must be definite and certain. There is a general principal of tariff construction or interpretation, that where a tariff is ambiguous it must be construed against the maker (the ocean common carrier in this instance) and in favor of the shipper.

When its tariff container rules are questioned an ocean carrier, such as PRMSA, would in certain instances feel bound to obtain the ILA-NYSA construction by Mr. Nicholas of the ILA's Rules on Containers. Of course, Mr. Nicholas properly avows that he is not a tariff (or traffic) man, and that his only duties relate to the ILA's labor

Rules on Containers. However, the practical effect of his rulings relating to containers transported by PRMSA would be to guide PRMSA in its interpretation of its tariff rules on containers. The ultimate result could be the passing on by PRMSA of a $1,000 penalty suffered by this ocean carrier to a shipper, NVOCC, consolidator, forwarder, or deconsolidator. In practical effect, we would have Mr. Nicholas indirectly interpreting an ocean carrier's tariff, even though he is not a party to the transportation contract. Stated another way, we would have the ILA in part, through the contract administration officer of the NYSA-ILA Container Committee, influencing the interpretation of a tariff of an ocean common carrier.

CONASA turns this viewpoint around, and contends that the FMC under the guise of tariff regulation is urged by certain parties other than CONASA to improperly venture outside the sphere of its statutory jurisdiction into the area of labor relations and collective bargaining to outlaw the only conceivable work preservation clause in the shipping [27] industry, and that just as the antitrust laws of the United States may not be utilized to outlaw valid union activity, so, too, must not the Shipping Acts which are economic regulatory statutes complementary to the antitrust laws.

CONASA further contends that the ILA's Rules on Containers must be reappraised continually to keep pace with rapidly changing work conditions, cargo movements and handling techniques. CONASA states that these Rules on Containers, like all other labor contract provisions are not rigid and static mechanisms and thus are not amenable to protracted administrative review.

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The short answer of the NVOCC's, the consolidators, forwarders, importers and Hearing Counsel to the contentions of CONASA is that much of the evidence relied upon by CONASA, particularly the evidence as to labor problems and work preservation rules, is irrelevant to the issue of the tariff rules on containers of PRMSA, and that the work preservation rules of the ILA are not in issue. However, it would appear that the FMC must not only consider PRMSA's tariff rules in their effect on the consolidators, forwarders and importers, but also in their broader effect on the public interest of maintaining steady flows of ocean commerce to and from Puerto Rico. In that broader sense CONASA's evidence as to labor problems and the work preservation rules is relevant to the issues.

The work preservation rules of the ILA were part of a labor agreement between the ILA and the shipping industry including the ocean common carriers, stevedores and terminal operators. The consolidators, forwarders, importers and NVOCCs were not parties to the labor agreement.

Nevertheless, many of these non-parties were aware of the labor agreement and its restrictive rules on containers. But these non-parties including NVOCCs endeavored to continue operating by continuing to deal with the ocean carriers under the tariffs of these carriers. For a number of years, the NVOCCs managed to have their containers [28] loaded away from the piers and then moved over the piers without further stripping or stuffing.

Consolidated Express, Inc. (CEI), an NVOCC, made illegal payments through its general manager from about 1961 or 1962 to about November 1972, to the pier superintendent and to the assistant pier superintendent, members

of the ILA, employed by Sea-Land at the waterfront facilities of Sea-Land at Elizabethport, N.J., totalling $200 per month on a regular monthly basis. The payments were listed in CEI's books as travel and entertainment expenses.

A vice-president and part owner of CEI, took the view that these payments were not made to avoid the stuffing and stripping of CEI's containers by the ILA at Elizabethport, but that the payments were made to expedite both the paperwork at the piers and the placement of the containers aboard ship when, for example, the containers reached the waterfront close to 4:30 p.m. when the pier was about to close down, and the containership was near sailing time. This witness also pointed out that it would be an advantage to CEI to rave CEI's containers stacked among the three layers of containers on top of the deck, rather than below deck, so that upon reaching Puerto Rico, CEI's containers would be among the first to be taken off the ship, and would reach the ultimate consignee earlier than the other containers stacked four deep below deck.

CONASA disputes the above views, and contends that these illegal payments were made to persons having no authority with respect to stowage aboard ship, and that the payments were made to avoid the stuffing and stripping requirement of the ILA's Rules. The true purpose of the pyments does not matter to the ultimate conclusions herein, but the circumstances show the intent of the ILA to hold on to the consolidation work, and the intent of at least one NVOCC to do this consolidation itself and to have its containers move relatively freely across the piers, as were many other containers which moved without restriction.

[29] An NVOCC may perform various special services for an exporter or importer, such as accepting prepaid,

collect or C.O.D. shipments, and offering storage in transit and warehousing facilities. The NVOCC may route its containers to match sailings of ocean carriers so as to avoid delays waiting for a ship. The NVOCC assumes certain liabilities for losses of the cargo of the exporter or importer and in this respect, at least, acts as a common carrier, even though the NVOCC has no ocean-going ships.

While an NVOCC is a common carrier in the view of the small exporter or small importer, whose packages the NVOCC consolidates with other exporters' or importers' packages to make a containerload, on the other hand, in relation to the ocean common carrier, such as PRMSA, the NVOCC is a shipper or consignee. In the utilization of PRMSA's tariff, the NVOCC is a shipper or consignee and should be treated as other shippers and consignees are treated.

The NVOCC makes a profit by paying the containerload rate for freight-all-kinds of the ocean carrier, while the NVOCC charges his individual package rates to the exporters or importers who do not individually have the volume of packages sufficient to make a containerload. In the view of ILA officials, the estimated profit of an NVOCC is unduly high in relation to its relatively small capital investment in facilities and equipment. Apparently this NVOCC profit was, in the ILA's mind, another reason justifying the restrictive treatment of the NVOCCs and consolidators, in the ILA's Rules on Containers.

Some NVOCCs have experienced hard times, which they attribute at least in part to the ILA's work preservation rules and to Sea-Land's and PRMSA's tariff rules on containers.

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Drake Marine, a division of Drake Motor Lines, Inc., commenced NVOCCs operations on May 15, 1970, in the Puerto Rican trade, and provided service between the ports of New York, Charleston, Jacksonville and Miami on the one hand, and on the other San Juan, Puerto Rico. [30] Drake Marine discontinued operations between New York and San Juan, and between Charleston and San Juan in March 1975.

Drake Marine was advised by PRMSA in January 1975 that all trailers (containers) tendered by it as a consolidator to PRMSA would be considered LTL or LCL shipments in accordance with the ILA's Rules on Containers, and accordingly Drake's trailers (containers) would have to be stripped at the piers. Drake was also advised that PRMSA would not furnish its containers to Drake. What this meant apparently was that PRMSA would not allow Drake or any other NVOCC to take a PRMSA container away from the piers. Nevertheless, Drake might bring a consolidated load in a non-PRMSA container to the piers, where under the tariff rules this containerload could be stripped and restuffed into a PRMSA container by ILA deepsea labor. In February 1975, Drake tendered eight trailers to PRMSA for delivery to Puerto Rico, and these containers were stripped and restuffed into thirteen PRMSA containers. Drake was assessed the transfer charge of $172 per 40-foot container.

Because of the above circumstances related to the Rules on Containers, and also because two other NVOCCs (Consolidated Express, Inc., and Twin Express, Inc.) were able to have their containers moved across the piers without stripping and restuffing, Drake discontinued its New York and Charleston/Puerto Rico operations. Consolidated Ex-

press and Twin Express continued to receive containers from PRMSA, and these two NVOCC's continued to have their containers moved across the piers without restriction because of a Court injunction obtained by them. The injunction did not apply to Drake and other NVOCCs, which had not joined in the Court proceeding with Consolidated Express and Twin Express.

Dolphin Forwarding, Inc., an NVOCC, has operated in the Puerto Rican trade since September 1964, mainly between New York and San Juan. It was advised by PRMSA in December 1974 that PRMSA could not provide[11] [31] Dolphin with containers because of the ILA's contract restrictions and because of the PRMSA tariff rules on containers which were patterned on the ILA's restrictions. Dolphin in its judgment became obliged to divert all of its container cargoes from the Port of New York to the Port of Jacksonville.

Dolphin in February 1970, purchased Acme Fast Freight International, Inc. (AFFI), which began operations in the

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[11] Presumably PRMSA meant that it could not provide containers to Dolphin where that would be contrary to PRMSA's tariff rules on containers, and it was assumed by PRMSA that its tariff rules would be violated by furnishing containers to Dolphin. CONASA points out that the ILA's Rules on Containers do not deny containers to shippers, but "merely" require that ILA labor be used to stuff and strip local cargo into and out of the containers, and that the containers are available at the pier facility where the local cargo is to be loaded or discharged by ILA labor. CONASA seems to ignore the ILA's Rule 1(e) as well as PRMSA's tariff rule 1(e), both of which provide that no carrier shall supply its containers to any consolidator or de-consolidator. Apparently CONASA interprets this to mean only a requirement not to supply containers unless the ILA strips and stuffs the containers. But, there is no ambiguity if you read rule 1(e) as it stands clearly by itself.

Puerto Rican trade in March 1960 under the name, Acme Fast Freight of Puerto Rico. AFFI experienced a period in the spring of 1968 when its containerloads were stripped by the ILA. Dolphin was never exposed to the ILA's "Rule 1" until its publication in PRMSA's initial tariff, and being unable to qualify under "Rule 1," it protested the PRMSA tariff rules. Dolphin by diverting its containers to Jacksonville, has lost some customers, and its service is slower than before. Dolphin fears that its survival is in jeopardy.

San Juan Freight Forwarders, Inc. (SJF), an NVOCC, has been operating in the Puerto Rican trade since July 1972, during which year none of its trailers were stripped and restuffed at the piers. In late October 1973, TTT began to strip every container of SJF. After PRMSA took over TTT's operations in October 1974, SJF began to have problems getting containers from PRMSA.

PRMSA has two subsidiary groups, one group managing and operating the roll-on-roll-off ships formerly operated by TTT (the TTT group) and [32] the other group, the conventional containerships of Sea-Land and Seatrain (the Sea-Land group). The two groups do not use the same waterfront facilities. The two managing and operating groups apparently at least for a time had different attitudes and reactions to the ILA's Rules on Containers. SJF continued after October 29, 1974, to receive containers from the TTT group, but could get no containers from the Sea-Land group. The containers furnished to SJF by the TTT group continued to be stripped at the piers.

By affidavit dated July 29, 1975, attached to Hearing Counsel's reply brief, the President of San Juan Freight Forwarders states that SJF has been forced to stop using

the Port of New York temporarily because of PRMSA's tariff rules on containers. This affidavit hereby is accepted as an addendum to Exhibit 73 of record.

The record contains considerably more evidence as to the problems faced by the NVOCCs above and by other NVOCCs and by other shippers and consignees, but the general picture above is sufficient to show that not all NVOCCs and shippers were treated alike. Enforcement of the ILA's rules varied from time to time, it varied as between Staten Island piers (TTT group) and New Jersey piers (Sea-Land group), and PRMSA's tariff rules were interpreted differently as to the furnishing of containers as between the TTT group and Sea-Land group. And most importantly, the NVOCCs were treated differently from other shippers who owned and loaded their containers with their own labor at their own facilities.

The Tariff Rules on Containers of PRMSA

Under PRMSA's tariff rules on containers, one exporter may have 20 packages of a particular commodity, these packages amount to a containerload, the container is loaded by employees of the exporter at the exporter's own facility located within 50 miles of a port, and the exporter delivers this container to the pier, and this container will not be stripped and restuffed at the pier by ILA deepsea labor, because the tariff provides, [33] rule 440, or 442.5, or 445, Rules on Containers, Rule 2A.(2), that "Containers loaded with cargo at a qualified shipper's facility with its own employees" are excluded from the requirement of loading by ILA deepsea labor.

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However, a second exporter with 20 packages of the same commodity who is not large enough, or for some reason does not have his own warehouse facility, and does not have his own employees to load the container, but instead delivers his 20 packages to a public warehouse within 50 miles of a port and has the 20 packages loaded by employees of the warehouse into the container, must have his container stripped and restuffed at the pier by ILA deepsea labor under PRMSA's tariff rule 440, or 442.5, or 445, Rules on Containers, Rule 1(a)(2).

Since it makes no sense for the second exporter above to incur the double handling of his goods and a stripping and stuffing charge at the pier as well, he must arrange for the trucking of his 20 individual packages to the pier where they will be loaded into a container by ILA deepsea labor.

Many exporters believe that when the packages are handled at the pier, they will be subject to pilferage, delay, and damage. These exporters believe that when cargo crosses a pier in a sealed container it is a lot less subject to pilferage and damage than when moved loose to be stuffed into a container at the pier. There is some dispute by CONASA that the danger of pilferage and damage at the pier is any different or any greater than the danger when the loose pieces are handled and stuffed into containers away from the piers.

Regardless of any conclusion as to the relative danger of pilferage and damage when the ocean transportation service of PRMSA is the same for two exporters who each ship 20 identical packages of the same commodity, to permit the first of these two exporters to have his container moved promptly and freely across the pier, and at the same time to require the second exporter to have his container

delayed, stripped and [34] restuffed or to require him to deliver his 20 packages loose to the pier, obviously restricts the freedom of choice of the second exporter and results in unfair and unjust discrimination against the second exporter.

A similar situation of undue preference and unjust discrimination may arise, where the first exporter's 20 packages are loaded at his own facility by his own employees and his container moves freely across the piers; whereas a second and a third exporter each has 10 packages, and in combination they amount to a similar 20-package containerload, but these 20 packages are consolidated by an NVOCC into one container, with the result that the second and third exporters may not have their consolidated container moved freely across the piers, again though PRMSA's ocean transportation service is the same for the container of the first exporter as it is for the container of the second and third exporter.

The impact of the 50-mile rule as it has been interpreted actually extends beyond 50 miles of a port, for example, in the case of consolidated container shipped via the Port of New York originating within 50 miles north of the Port of Boston, but more than 50 miles from the Port of New York. On the other hand, an exporter consolidating at a public warehouse 150 miles due west of the Port of New York would not have his container stripped at the Port of New York because this warehouse is not within 50 miles of any CONASA port.

Under PRMSA's tariff rules on containers an import containerload discharged at a qualified consignee's facilities by its own employees is not required to be stripped and stuffed at the piers by ILA deepsea labor, Rule 2B(2). The

qualified consignee is defined as the purchaser or one who otherwise has a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the import cargo being delivered and who is named in the delivery order. But if such consignee does not own or operate his own warehouse facility and instead uses a public warehouse the consignee, Rule 2B(4)2., must [35] pay the normal warehouse storage fees for a minimum of thirty days, and meet other requirements in order to be excluded from the requirement that his import containerload be stripped and stuffed at the piers by deepsea ILA labor.

As seen above, one importer of a containerload of shoes who unloads his container at his own facilities with his own employees may immediately distribute these shoes to retail outlets. However, another importer of a containerload of shoes who does not have his own warehouse facilities and employees, and who uses a public warehouse to unload the container must pay a warehouse storage fee for a minimum of 30 days, and furthermore, as the tariff rules provide, this second importer may not transfer title to the shoes within the 30 days of warehousing, Rule 2B(4)3. As seen, the tariff rules on containers of PRMSA restrict the freedom of some importers in moving merchandise and add substantially to their costs, while other importers are not so treated.

In PRMSA's tariff rules on containers there are provisions in Rule No. 440 (applicable at CONASA ports) and in Rule No. 442.5 (applicable at the South Atlantic Ports of Charleston and Jacksonville) which provide in rule 1(e) that no carrier or direct employer[13] shall supply its con-

[13] The tariff says "employee," probably a typographical error. The ILA's Rules on Containers (Exhibit No. 95) also contain in

tainers to any consolidator or de-consolidator, and further that all rule 1 containers be stuffed or stripped at a waterfront facility. Rule 445 (applicable at the Port of New Orleans) contains a different rule 1(e), which does not mention carriers, but does refer to "employer" and is otherwise the same as the rule 1(e) in Rules 440 and 442.5 above. Obviously, when an ocean carrier supplies equipment (containers) to one shipper but not to a second similar shipper, this action and the tariff rule providing for such action are unjustly discriminatory and unlawful.

[36] Under the tariff rules of Sea-Land and GPRL in effect in prior years before these two carriers placed into their tariffs the rules now substantially adopted by PRMSA as its tariff rules on containers, and when Sea-Land and GPRL in their operations in the Puerto Rican trade had no restrictive rules on containers, at those times the shippers, including the NVOCCs, consolidators and forwarders, were free, at least insofar as these ocean carriers' tariffs provided, to obtain containers from these ocean carriers, the shippers were free and able to load containers at any facilities away from the piers, the shippers could deliver containers to the ocean carriers at their waterfront facilities, and these containers could be placed aboard the containerships without any stripping and restuffing, at the piers. At present as seen, the shipping acts are being violated by the unequal treatment of shippers. Regardless of whether the treatment of shippers is unequal, the tariff rules may also be unjust and unreasonable insofar as they

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their Rule 1(e) the words, direct employee, so it appears that PRMSA copied the ILA's Rules and typographical error. Direct employer in the usual sense of the collective bargaining agreement, means employer of ILA longshoremen.

may require the uneconomic second handling (stripping and restuffing) of containers at the piers when there is no ocean transportation need for such second handling. Certainly the rehandling or stripping [and] restuffing of a container does not add anything of value to the ocean service provided to the shipper.

DISCUSSION AND CONCLUSIONS

Section 14 Fourth of the 1916 Act provides in part that no common carrier by water in the Puerto Rican trade shall make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of cargo space accommodations or other facilities.

PRMSA will not supply PRMSA containers to certain consolidators and deconsolidators, whereas PRMSA will supply its containers to other shippers and consignees in the same geographic area. PRMSA's rules on containers unfairly treat and unjustly discriminate against certain [37] consolidators and deconsolidators inasmuch as PRMSA does not provide them the same facilities (containers) as PRMSA provides other shippers and consignees, in violation of section 14 Fourth.

PRMSA's rules on containers are in violation of section 14 Fourth insofar as these rules permit certain containerloads to move freely over facilities of PRMSA, that is, over the piers, while PRMSA's rules also require other similar containerloads to be stripped and restuffed at the piers by ILA deepsea labor. The unlawful discrimination results from the unequal availability of the piers for movement of containerloads to and from ships.

Clearly, PRMSA's tariff rules on containers unfairly treat and unjustly discriminate against certain shippers and consignees in the matter of cargo space accommodations and other facilities, including the use of the piers and the use of containers for consolidated shipments.

Section 16 First of the 1916 Act provides in part that it is unlawful for any common carrier by water to make or give any undue or unreasonable preference or advantage to any person, or to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect.

PRMSA's rules on containers are in violation of section 16, First, in that they unduly prefer certain shippers and consignees, such as for example, those who have certain facilities and whose employees stuff and strip containers, while these rules subject other shippers and consignees to undue and unreasonable prejudice and disadvantage, such as for example, those shippers and consignees who do not have their own facilities or do not have their own employees to stuff and strip containers. PRMSA's rules require certain shippers to suffer transfer or rehandling charges at the piers for their containers to their undue prejudice, while other shippers escape such transfer charges to their undue preference, in violation of section 16, First.

[38] Section 18(a) of the 1916 Act and section 4 of the 1933 Act, in part, together provide that the common carriers by water in the Puerto Rican trade must provide just and reasonable rates, regulations and practices relating to various matters, including the receiving, handling, transporting, storing or delivering of property; and that if the FMC finds these rates, regulations and practices to be un-

reasonable, it may prescribe just and reasonable rates, regulations and practices.

PRMSA's rules permit shippers to be held liable for fines or penalties of $1,000 per container, which penalties have no relationship to the cost of transportation or of handling of the container from an ocean transportation viewpoint. These PRMSA tariff rules in part are ambiguous and uncertain in that they are not clear on their face, and are subject to various interpretations. PRMSA's rules are unreasonable insofar as certain shippers must undergo the added transfer charges, for example, of $172 per 40-foot container, in order to avail themselves of PRMSA's FAK rate on containerloads, when there is no transportation necessity to transfer the contents of a container from one container to another container. PRMSA's rules are unreasonable in a number of other ways, including that they deny containers to some shippers while providing containers to other shippers, and that the rules require certain consignees to warehouse their imports under certain restrictions while not so requiring other consignees to so warehouse their imports. For the reasons stated in this paragraph PRMSA's tariff rules on containers are unjust and unreasonable in violation of section 18(a) of the 1916 Act and of section 4 of the 1933 Act.

There are certain fundamental truths pertinent to these proceedings. One is that all shippers should be treated substantially equally, provided of course that they seek and receive the same ocean transportation service from the same ocean common carrier. If we were considering only the tariff rules on containers of an ocean carrier, without knowing what caused these rules to be put in the tariff, clearly we would find that [39] tariff rules, such as

PRMSA's rules on containers, are unlawful. In an ordinary proceeding there would be no need to go any further, that is, there would be no need to go beyond an examination of the tariff rules on containers. But the present proceedings have potential ramifications which go beyond the ordinary problems of the legality of a tariff rate or rule, and we must consider these ramifications in issuing our order herein.

Another fundamental truth is that the FMC has jurisdiction over tariffs (rules, rates, etc.) of ocean common carriers in the United States mainland/Puerto Rico trade. Keeping the above two fundamentals in mind, the FMC clearly has jurisdiction over the lawfulness of PMRSA's tariff rules in the Puerto Rican trade. Secondly, if the tariff rules provide for grossly unequal treatment of similarly situated shippers the rules are clearly unlawful under the Shipping Acts. Furthermore, if one shipper receives preferred treatment, and another shipper is subjected to unfair, unjust and grossly discriminatory treatment, such treatment is clearly unlawful when for the same ocean transportation service, despite any reason leading to the discriminatory treatment.

In other plainer words, unlawful tariff rule discrimination is unlawful tariff rule discrimination, regardless of the fact that it may have been caused by a work preservation rule, and it matters not at all whether the work preservation rule is lawful in and of itself. It is elemental and basic to United States transportation law, that shippers all be treated equally, whether large or small, or whether they differ in their plants, warehouse facilities or in other respects, provided only that they are buying identical transportation services.

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One other fact should be remembered. We are not here dealing with section-15 agreements between two or more persons subject to the Shipping Acts. We are dealing merely with tariff rules on containers of an ocean common carrier. A tariff provision is not an agreement; rather it is a unilateral statement of the author of the tariff. Basically a [40] tariff sets the price and terms at which a common carrier offers its services. Therefore any citations of cases dealing directly or peripherally with section-15 agreements are really not directly in point, although they may be of some background interest.

The Commission previously has ruled on a matter which had substantially similar, if not the same, legal implications as the matter now at issue. The factual background in the previous case was that on February 19, 1969, the ILA and the employers of longshoremen at the Port of Miami entered into a deepsea longshore agreement, which contained a Clause 19, in which clause there was a series of rules designed to protect and preserve the work jurisdiction of longshoremen of the ILA at deepsea piers and terminals.

Clause 19 in part required that certain containers containing consolidated loads, destined to or coming from any person including a consolidator or deconsolidator who is not the beneficial owner of the cargo, which containers come from or are destined to any point within a 50-mile radius from the center of the port, shall be stuffed and stripped by ILA labor at longshore rates at a waterfront facility. Also, Clause 19 provided where such a container had not been stuffed and stripped by the ILA that the ocean carrier should pay liquidated damages of $250 per container to the ILA if for any reason the container was no longer at the

waterfront facility where it should have been stuffed or stripped.

Based upon the above labor agreement, South Atlantic and Caribbean Line, Inc. (SACL) an ocean common carrier then operating in and out of Miami in the Puerto Rican trade, published an embargo notice which stated that it would not book or accept certain consolidated containerloa[d]s at Miami unless certain conditions were met. One proviso was that the shipper agree to indemnify SACL in the amount of $250 per container in the event that the ILA invoked the liquidated damages provision of Clause 19. While this $250 penalty proviso later was deleted by SACL, [41] its embargo notice stood in effect as an absolute refusal to carry "clause 19 cargo." The legal question then became whether the embargo notice imposed a true embargo, because financial loss on the carriage does not normally constitute sufficient justification for the institution of an embargo. The usual justification for an embargo is congestion or physical disability, and there was no physical disability of SACL to carry the consolidated containerloads.

SACL did not want to perform the additional terminal or transfer service of stripping and restuffing the consolidated containerloads, inasmuch as that was not something offered by SACL to the shipping public as an aid to the efficient transportation of goods. If anything, from SACL's point of view the stripping and restuffing was a penalty for handling NVOCCs' or consolidators' trailers. In this situation at Miami, SACL itself did not employ the ILA labor and was not a party to the labor agreement, but SACL's stevedore at Miami presumably was a party to the labor agreement.

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Under the above circumstances, in *South Atlantic and Caribbean Line, Inc.*, 12 F.M.C. 237, at page 241 (1969), the Commission stated:

> We are not here concerned with the ultimate validity of clause 19. Such a determination is beyond our jurisdiction and is within the province of the National Labor Relations Board. But whatever its validity, we cannot permit the mere execution of a collective bargaining agreement to override the clear requirements of a statute we are charged to administer. Statutes controlling the activities of common carriers and the obligations of those carriers are not subordinate to the requirements of labor contracts. *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, 73 M.C.C. 617, at page 627 (1957).

The Commission further went on to say at pages 241 and 242:

> We are not without sympathy for the position in which SACL finds itself, but it is of course not an excuse for the imposition of an unlawful embargo.
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> [42] Our decision here does not reach either the valid-[ity] of the collective bargaining agreement and clause 19 or the questions of what actions by SACL would be proper should the ILA insist on invoking clause 19.
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> Although the Commission cannot deal with the new labor contract which is the immediate source of this condition, we can deal with those persons affected by it [illegible] within our jurisdiction. In that posture we do

> not intend to permit disruptions of our waterborne foreign or domestic offshore commerce.
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> • • •
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> Now we would accept any appropriate tariff filing on short notice, the result of which would be to make the carrier whole in the event clause 19 is invoked and which would enable the cargo to move.

The above words of the Commission in 1969, with very slight adjustments, might well be restated and be appropriate for the present investigations. What the Commission apparently hoped for in the 1969 SACL matter, was a mutually beneficial result, which not only would not interfere with the collective bargaining labor agreement, but which also would enable the consolidated containerloads of the NVOCCs to move freely in compliance with the Shipping Acts, and which would not place any undue burden on the ocean carrier. Of course, there were some differences between the SACL matter and the present investigations. In 1969 in the SACL matter, there was a carrier's embargo of certain NVOCC or consolidated containerloads. Notice is taken that SACL canceled its tariff in 1970, and presumably went out of business in that year. At present we now are concerned with, among other matters, what amounts to an embargo of the furnishing by PRMSA of PRMSA's containers to the NVOCCs and to the consolidators.

In 1969, the Commission stated that statutes controlling the activities of ocean common carriers and the obligations of these carriers are not subordinate to the requirements of labor contracts. The same is true in 1975. In 1969, the Commission said that an ocean common carrier has a duty and obligation to accept and carry all cargo tendered to it

[43] in accordance with the terms and conditions of its published and filed tariffs, *South Atlantic and Caribbean Line, supra,* at page 239. The same is true in 1975, and that duty includes the furnishing of the ocean carrier's containers and facilities equally to similarly situated shippers. In 1969, the Commission said that although it could not deal with the new labor contract, it could deal with those persons affected by it and within the Commission's jurisdiction. The same is true in 1975. In 1969, the Commission said that it did not intend to permit disruptions of our waterborne foreign or domestic offshore commerce. Obviously, this is true in 1975.

In *Volkswagenwerk* v. *F.M.C.,* 390 U.S. 261 (1968), the Supreme Court found that a certain agreement among members of the Pacific Maritime Association to impose certain assessments upon member ocean common carriers, stevedores, and terminal operators and their customers was subject to the jurisdiction of the FMC under section 15 of the 1916 Act. Therein it was stated, at page 278, that we are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU (International Longshoremen's and Warehousemen's Union). CONASA in its opening brief states that in this *Volkswagenwerk* case the Supreme Court reaffirmed that there is a labor exemption from antitrust statutes for labor agreements which would otherwise be subject to such antitrust regulation. What the Supreme Court actually said was that those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, but the Supreme Court went on to say

that the assessment arrangement or agreement in issue affected only relationships among Association members and their customers. Thus, there was no labor agreement in issue in the *Volkswagenwerk* case.

More importantly, nowhere in *Volkswagenwerk* v. *F.M.C.*, *supra*, is there any issue of the lawfulness of a tariff rule. Whatever [44] significance that case has to the present investigation possibly may be found in the concurring statement of Justice Harlan. He was concerned about the exact extent of the labor exemption from statutes regulating competition. He pointed out that no collective bargaining agreement was before the Court and that it would be inappropriate to suggest the affirmative extent of the labor exemption or immunity. He went on to say, at page 287, that:

> the assessment agreement before us is not immune or exempt, for it raises 'shipping' problems logically distinct from the industry's labor problems; at the same time Commission review itself must be circumscribed by the existence of labor problems that it is not equipped to resolve.

In the present proceeding, PRMSA's tariff rules on containers raise shipping problems logically distinct from the labor problems which may be raised by the ILA's Rules on Containers. Anytime two shippers seeking the same ocean transportation service are treated differently by an ocean carrier, to the extent that one shipper is unduly and unreasonably preferred and the other shipper is unduly and unreasonably prejudiced, there is a shipping problem. The FMC must exercise its jurisdiction over shipping problems.

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There is no evidence in this record that any ocean carriers other than Sea-Land, GPRL, and PRMSA placed in their tariffs, rules on containers patterned after the ILA's Rules on Containers. To the extent that these carriers did so, it appears that they did as a matter of individual choice. The vice-president, traffic, of a management subsidiary of PRMSA recommended that PRMSA file its tariff rules on containers, among other reasons, so that PRMSA could recover the $1,000 penalty (liquidated damages) per container from the shipper and to provide that PRMSA could not supply trailers (containers) to NVOCCs. As noted heretofore, the ILA's rules do not require that the ocean carrier pass on the $1,000 penalty to the shipper. Before PRMSA took over the [45] operations of Sea-Land, Seatrain and TTT, these three ocean carriers had pursued different courses with respect to tariff rules on containers. Sea-Land filed such rules, Seatrain did not file, and TTT filed rules but its filing was rejected by the FMC. From these facts it is concluded that there was no concerted agreement between the carriers in the Puerto Rican trade, or between the many ocean carriers operating in both the foreign and domestic trades out of New York, to publish similar tariff rules on containers. The ILA and the shipping associations insofar as their collective bargaining agreement contained the ILA's Rules on Containers apparently considered these to be strictly a labor matter and not a shipping matter or problem subject to the filing of a section-15 agreement.

Notwithstanding that the present case involves tariff rules and shipping problems and does not involve any section-15 agreement between two or more persons subject to the 1916 Act, some consideration may be appropriate con-

cerning the so-called "labor exemption" from antitrust laws. In *United Stevedoring Corp.* v. *Boston Shipping Association*, 16 F.M.C. 7, the Commission found that a certain agreement among and between members of the Boston Shipping Association as to the allocation of labor gangs among stevedores was entitled to the labor exemption and therefore not required to be filed and approved under section 15 of the Shipping Act, 1916.

The Commission stated in *United Stevedoring Corp., supra*, at pages 11, 12, 13, 14, and 15:

> The 'labor exemption' originated in the area of accommodation of the labor laws and the antitrust laws. • • • Thus, the analogy to a 'labor exemption' from the shipping laws is obvious. We are in agreement with the view that such a labor exemption should exist. However, the problem is one of line drawing, i.e., just how far should the labor exemption extend and at what point should the shipping laws be activated.
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> [46] The Supreme Court attempted to balance the interests of both policies so that only 'legitimate' collective bargaining objectives would be without the scope of the antitrust laws.
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> Hence, from these cases have evolved the various criteria for determining the labor exemption from the antitrust laws and which we herewith adopt for purposes of assisting us in determining the labor exemption from the shipping laws with this caveat. These criteria are by no means meant to be exclusive nor are they determinative in each and every case. Just as

in the accommodation of the labor laws and the antitrust laws the courts have resolved each case on an ad hoc basis, so too will we.

• • •

Upon thorough review of the views presented on this issue, we conclude that no valid regulatory purpose would be served in requiring organic agreements of pure collective bargaining units to be filed and approved pursuant to section 15. However, to the extent that any organic agreements provide for purposes other than collective bargaining, no labor exemption from section 15 would apply to those portions of the organic agreements, and filing and approval of those provisions would be required. Thus the line is drawn at the point where purely labor matters cease and shipping matters begin.

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The mere fact, therefore, that a certain agreement is part of a collective bargaining agreement does not automatically immunize that agreement from the antitrust laws.

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In the same manner in which offensive collective bargaining agreements in general are challenged under the antitrust laws, collective bargaining agreements in the shipping industry can be challenged under the shipping laws, with due regard for the labor policy considerations discussed above.

In the present investigations, it is herein found that the tariff rules on containers of PRMSA are a shipping matter subject to shipping laws, and separate from any labor

matter and the labor laws. However, if one were to conclude that PRMSA's rules on containers are partly a shipping matter and partly a labor matter, one still must conclude that the shipping part is of such importance that it is not immunized from the shipping laws.

[47] The United States Court of Appeals for the Second Circuit, in *New York Shipping Association, Inc.* v. *Federal Maritime Commission,* 495 F.2d, 1215 (2d Cir.) (1974), denied the petitions to review filed by NYSA and the ILA, and found that a certain assessment agreement was subject to the filing and approval requirements of section 15 of the 1916 Act. The Court of Appeals made references to *Volkswagenwerk* v. *FMC, supra,* among others, and referred to Justice Harlan's concurrence wherein he warned against assuming that a maritime agreement must always fall neatly into either the Labor Board or Maritime Commission domain. The Court of Appeals stated that like the *Volkswagenwerk* case, its case also raised shipping problems logically distinct from the industry's labor problems. The Court of Appeals went on to say that in determining whether the agreement should be approved, disapproved or modified, the Commission must thus continue to weigh the Shipping Act and labor interests raised by different portions of the agreement and should move with caution in areas of greater collective bargaining concern.

In none of the cases referred to by the parties in their briefs do I find any holding that where there is a shipping problem the Federal Maritime Commission should ignore that problem. I must conclude that the FMC has jurisdiction over the shipping problem here in issue, and it must take steps to remedy that problem. Of course, the FMC

should proceed cautiously in issuing its findings and order herein.

Attention is invited to Exhibit No. 88, the supplemental testimony of the President of CONASA, and to his oral testimony on May 7, 1975. His testimony should be given the most careful consideration. The recent CONASA-ILA negotiations, leading to the current 1974-1977 labor contract, commenced again with the demand of the ILA that all containers be stuffed and stripped on the piers by the ILA. CONASA's counter position at the outset of these negotiations was that all containers should be permitted to move without any restriction by the ILA. The ILA immediately rejected CONASA's proposal stating in that event a strike by [48] the ILA would be assured. CONASA represented that the desire of the shipping industry was to permit shippers as much flexibility as possible without causing an assured strike.

Many median or compromise proposals were discussed and analyzed. For example, the New York Foreign Freight Forwarders and Brokers Association suggested that consolidators be permitted to operate, utilizing ILA deepsea labor within the waterfront terminal areas, but away from the actual pier operations of ship loading and unloading. The ILA rejected this proposal upon receiving legal advice that this proposed approach would constitute an affirmative extension of the ILA's work jurisdiction subject to attack before the NLRB. Mny other proposals were discussed at great length and rejected. Finally the ILA and the shipping industry settled on the ILA's Rules on Containers which had been in effect for some time.

The wages issues and the fringe benefit issues consumed only a few hours during the continuous negotiations from

June 11 to June 21, 1974. The issue which required the continuous time and efforts of the negotiators on almost a 100 percent basis was the containerization issue. In the view of CONASA's president any disturbance of the ILA's Rules on Containers would result in a resurgence of labor unrest on the entire Atlantic and Gulf Coasts to the detriment of the longshoremen, ocean carriers, stevedores and the general public as well. There is no reason to doubt the testimony of CONASA's president.

PRMSA, as seen, fears an ILA shutdown if it is required not to follow the ILA's Rules on Containers. Nevertheless, the Commission must act in the overall public interest.

The Commission must make findings with respect to the 1916 and 1933 Acts. Also, it would recognize that any order it may issue should be carefully drawn so as not to precipitate any actions which may interfere with the steady flow of ocean commerce in the Puerto Rican trade. PRMSA should be given a reasonable period of time to adjust its tariff rules [49] on containers so that they do not violate the Shipping Acts, and also so that PRMSA may continue to operate. Undeniably such an adjustment of PRMSA's tariff rules will be most difficult, but PRMSA is closest to the problem and should not be fettered by any rigid preconceived notions as to the best solution. Within the PRMSA management are persons with many years experience in the shipping business, and of course, PRMSA should be free to consult with other experienced tariff and traffic experts. The overall aspects of the public interest necessitate that the effective date of an order requiring the cancellation of PRMSA's tariff rules on containers be deferred for three months, or such other reasonable period as may be appropriate as the circumstances may develop.

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ULTIMATE FINDINGS

It is found that the Federal Maritime Commission has jurisdiction over the tariff rules on containers of PRMSA in the Puerto Rican trade, and that these tariff rules are unlawful in violation of sections 14 Fourth, 16 First and 18(a) of the 1916 Act, and of section 4 of the 1933 Act.

It is ordered, subject to review by the Commission on appeal or upon its own motion, that the tariff rules on containers of PRMSA be canceled, and that PRMSA publish and file revised tariff rules on containers and other tariff provisions as may be necessary which will treat all similarly situated shippers and consignees, including consolidators and deconsolidators, fairly and equally. It is further ordered that the effective date of this order, requiring PRMSA to cancel its tariff rules on containers and to publish and file new tariff rules on containers and other tariff provisions, be deferred for a period of three months from the date of this initial decsion if no exceptions are filed thereto and there is no Commission review thereof. In the event that there is review by the Commission of this decision, it is suggested that the Commission, if it adopts the findings herein, give PRMSA a reasonable [50] time to cancel its tariff rules on containers and to publish and file new tariff rules on containers and other tariff provisions which will be lawful under the 1916 and 1933 Acts and which at the same time will enable a steady flow of ocean commerce in the Puerto Rican trade and which will be consistent with the overall aspects of the public interest.

/s/ CHARLES E. MORGAN
Charles E. Morgan
Administrative Law Judge

Washington, D.C.
October 9, 1975

APPENDIX D

Judgment of the United States Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1776

September Term, 1981

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS and NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents,

NATIONAL CUSTOMS BROKERS and FORWARDERS ASSOCIATION OF AMERICA, INC., et al., INTERNATIONAL ASSOCIATION OF NVOCCS, and AMERICAN IMPORTERS ASSOCIATION, INC.,

Intervenors.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL MARITIME COMMISSION

BEFORE:

WRIGHT, MACKINNON and WALD, *Circuit Judges*

Appendix D—Judgment of the United States Court of Appeals for the District of Columbia Circuit

ORDER

This case came on to be heard on a petition for review of an order of the Federal Maritime Commission and was argued by counsel. On consideration thereof, it is

ORDERED, by the Court, that the record in this case is remanded to the Federal Maritime Commission for reconsideration of its decision in light of intervening judicial decisions in accordance with the opinion for the Court filed herein this date.

Per Curiam

FOR THE COURT:

/s/ GEORGE A. FISHER
GEORGE A. FISHER, *Clerk*

Dated: March 2, 1982

Opinion for the Court filed by Circuit Judge Wright

Opinion concurring in part and dissenting in part filed by Circuit Judge MacKinnon

United States Court of Appeals
for the District of Columbia Circuit
FILED MAR. 2, 1982
GEORGE A. FISHER, *Clerk*

APPENDIX E

Relevant Statutes

Maritime Labor Agreements Act
Pub. L. No. 96-325, 94 Stat. 1021 (Aug. 8, 1980)

To amend the Shipping Act, 1916, to exempt collective bargaining and related agreements from regulation by the Federal Maritime Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. That this Act may be cited as the "Maritime Labor Agreements Act of 1980".

SECTION 2. Section 1 of the Shipping Act, 1916 (46 U.S.C. 801) is amended by adding, at the end of that section, the following:

"The term 'maritime labor agreement' means any collective bargaining agreement between an employer subject to this Act, or group of such employers and a labor organization representing employees in the maritime or stevedoring industry, or any agreement preparatory to such a collective bargaining agreement among members of a multiemployer bargaining group, or any agreement specifically implementing provisions of such a collective bargaining agreement among members of a multiemployer bargaining group, or any agreement specifically implementing provisions of such a collective bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group."

SECTION 3. The first paragraph of section 15 of the Shipping Act, 1916 (46 U.S.C. 814) is amended to read as follows:

"SEC. 15. Every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements or any provisions of such agreements, unless such provisions provide for an assessment agreement described in the fifth paragraph of this section."

SEC. 4. Section 15 of the Shipping Act, 1916, as amended, is further amended by inserting between the fourth and fifth paragraphs thereof, the following new paragraph:

"Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, shall be deemed approved upon filing with the Commission. The Commission shall thereafter,

upon complaint filed within 2 years of the date of filing of the agreement, disapprove, cancel, or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States. The Commission shall issue its final decision in any such complaint proceeding within 1 year of the date of filing of the complaint. To the extent that any assessment or charge is found, in such a complaint proceeding, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the unjust discrimination or unfairness for the period of time between the filing of the complaint and the final decision by means of assessment adjustments. Such adjustments shall be implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has ceased activities subject to the assessment or charge, in which case reparation may be awarded. To the extent that any provision of this paragraph conflicts with the language of section 22 or any other section of this Act, or of the Intercoastal Shipping Act, 1933, the provisions of this paragraph shall control in any matter involving assessment agreements described herein."

SEC. 5. Section 45 of the Shipping Act, 1916 (46 U.S.C. 842), and all references thereto, is redesignated section 46 and a new section is added as follows:

"SEC. 45. The provisions of this Act and of the Intercoastal Shipping Act, 1933, shall not apply to maritime labor agreements and all provisions of such agreements except to the extent that such provisions provide for the funding of collectively bargained fringe benefit obligations

on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized. Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this Act or of the Intercoastal Shipping Act, 1933, for any rates, charges, regulations, or practices of a common carrier by water or other person subject to this Act which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement."

SEC. 6. The changes made to existing laws by the provisions of this Act shall not affect any claims for reparation, if any, based upon conduct occurring prior to the date of enactment of this Act or formal Commission proceedings commenced prior to the date of enactment of this Act.

Labor Management Relations Act
§ 8(b)(4), 29 U.S.C. § 158(b)(4)

(b) It shall be an unfair labor practice for a labor organization or its agents—

• • •

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter:

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

Labor Management Relations Act
§ 8(e), 29 U.S.C. § 158(e)

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible

and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or any industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

Shipping Act § 14 Fourth, 46 U.S.C. § 812 Fourth

No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * *

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper

loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Shipping Act § 16 First, 46 U.S.C. § 815 First

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of tariff to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided,* That within thirty days after enactement of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission shall determine whether or not such rate, rule or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule or regulation.

Appendix E—Relevant Statutes

Shipping Act § 18(a), 46 U.S.C. § 817(a)

(a) Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the Commission and keep open to public inspection, in the form and manner and within the time prescribed by the Commission, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a thorough route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the Commission and after ten days' public notice in the form and manner prescribed by the Commission, stating the increase proposed to be made; but the Commission for good cause shown may waive such notice.

Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and

order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

Intercoastal Shipping Act § 4, 46 U.S.C. § 845a

Whenever the Federal Maritime Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice demanded, charged, collected, or observed by any carrier subject to the provisions of this chapter is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice: *Provided,* That the minimum-rate provision of this section shall not apply to common carriers on the Great Lakes: *Provided further,* That upon such finding of unjustness or unreasonableness in a proceeding instituted by a complainant pursuant to the provisions of section 821 of this title, the Commission shall direct full reparation to the complainant of the difference between the charge collected and the just and reasonable rate, fare, or charge, plus interest on such amount computed on the basis of the average of the prime rate charged by major banks, as published by the Board of Governors of the Federal Reserve System, during the period to which the reparation applies.

APPENDIX F

Order on Reconsideration of Federal Maritime Commission

Served
June 14, 1978
Federal Maritime Commission

FEDERAL MARITIME COMMISSION
Docket No. 73-17

SEA-LAND SERVICE, INC. and GULF PUERTO RICO LINES, INC.
PROPOSED RULES ON CONTAINERS

Docket No. 74-40

PUERTO RICO MARITIME SHIPPING AUTHORITY—
PROPOSED ILA RULES ON CONTAINERS

ORDER ON RECONSIDERATION

These proceedings were instituted to determine the legality of the so-called "50-mile container rules" proposed by Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Ltd., and subsequently, as successor to these two carriers, by Puerto Rico Maritime Shipping Authority (PRMSA). After extensive hearings and the filing of briefs, Administrative Law Judge Charles E. Morgan issued an Initial Decision finding the rules unlawful under the Shipping Act, 1916. Exceptions to the Initial Decision were filed, as were replies to such exceptions. Oral argument was heard and the matter came before the Commission for decision.[1]

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[1] For a more comprehensive discussion of the early proceedings in this case, see our Report and Order Adopting Initial Decision issued this date.

Appendix F—Order on Reconsideration of Federal Maritime Commission

[2] By Order dated August 10, 1977, the Commission discontinued these consolidated proceedings as moot on the basis of a ruling by the Court of Appeals for the Second Circuit,[2] affirming the National Labor Relations Board decision finding the collective bargaining provisions underlying the 50-mile rules unlawful under the National Labor Relations Act, and on the basis of PRMSA's "effective withdrawal" of the allegedly unlawful rules on containers.

Following issuance of the Order of Discontinuance, petitions for reconsideration were filed. On the basis of those petitions, the Commission issued its Order Granting Reconsideration on November 22, 1977. Replies to the petitions have now been filed by Hearing Counsel and PRMSA.

PETITIONS

Petitions for reconsideration of the Commission's discontinuance of this proceeding were filed by National Customs Brokers & Forwarders Association of America, Inc., New York Foreign Freight Forwarders & Brokers Association, Inc., and Consolidated Forwarders Intermodal Corp. (filing a joint [3] petition); International Association of NVOCC's; and Hearing Counsel.

The petition of National Customs Brokers & Forwarders Association of America, Inc. (National), *et al.*, alleged that the Commission erred in holding that the "Note" in the PRMSA tariff dated February 29, 1976 was an "effective withdrawal" of the proposed 50-mile rules which vitiated any need for a Commission determination of the rules' validity under the Shipping Act, 1916 and the Intercoastal

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[2] *International Longshoremen's Association* v. *N.L.R.B.*, 537 F.2d 706 (1976), *cert. den.* 429 U.S. 1040 (1977), *rehearing denied* 51 L. Ed. 2d 589.

Shipping Act, 1933.[3] In the 10-page argument in support of its petition, National raised numerous issues.

National first posited that, to have reached the conclusion that it did, this Commission must have taken "official notice" of certain extra-record facts—an action alleged to be error for numerous reasons. First, in order to be a fact susceptible to "official notice", it must, indeed, be fact under both our rules and those of the Federal Courts (see, 46 C.F.R. Section [4] 502.226(a) and Federal Rules of Evidence, Rule 201(b), 28 U.S.C.A.). National pointed out that under the Federal Rules an adjudicative fact of which judicial notice may be taken:

> . . . must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. (Rule 201(b), *supra.*)

Citing the notes from the Advisory Committee on Proposed Rules, accompanying this rule, National claimed that the essence of this rule is the requirement that the fact be one of "a high degree of indisputability." National claimed that the tariff note on which the Commission based its deci-

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[3] The tariff note, in pertinent part provided:

. . . the New York Shipping Association . . . has informed PRMSA that the NYSA "have been advised by the International Longshoremen's Association, AFL-CIO that they will take no action against the NYSA or its members requiring them to enforce such rule."

Therefore, the Rule set forth herein shall not be enforced until a determination of the validity of the Rule is made by the proper court of law or further advice is given from the parties of the Collective Bargaining Agreement.

sion to discontinue the proceeding is merely advice from the International Longshoremen's Association (ILA) to the New York Shipping Association which in turn was passed on to PRMSA and which ultimately was filed in the tariff. As such, that note was allegedly nothing more or less than ". . . a triple hearsay statement . . . (which) cannot rise to the dignity of a fact not subject to reasonable dispute. . . ."

National further argued that the tariff note deals only with the Port of New York while PRMSA serves other ports as well and that there is no basis upon which the Commission could conclude from the tariff note that the proposed rules will not be enforced at those other ports. As a result, National characterized the Commission's conclusion that the rules are not being enforced at other ports as pure speculation.

[5] National also challenged the Commission's determination that the rules at issue have been mooted. Citing case law, National took the position that even if PRMSA had actually withdrawn its rule, the Commission could not consider the issues raised by the rules to be moot, because to do so would mean that:

> An ocean carrier can adopt a practice by tariff rule, gain its benefits for several years, put injured parties to the trouble and great expense of a lengthy docket and then, as the proceeding is drawing to a close, deny the parties the opportunity for a decision by withdrawing the tariff rule.[4]

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[4] Cases cited by National include: *Southern Pacific Terminal Co.* v. *I.C.C. et al.*, 219 U.S. 498; and *Walling* v. *Haile Gold Lines*, 136 F2d [sic] 102 (and cases cited therein).

National concluded that if this Commission were to permit this course of action, we would be sanctioning an abuse of our processes and an abuse of the Shipping Act, 1916.

Finally, National submitted that all segments of the export-import commerce of the United States would benefit from a determination on the merits of the validity of the proposed rules under the Shipping Act, 1916. National explained:

> It is always possible that the ILA may in the future claim that the NLRB decision dealt only with that portion of the rules which denied containers to the NVOCC, and then only in the Puerto Rican trade and that the NLRB did not treat other aspects of the rules relating to exporters and importers. Also, it is always possible that another union, not party to the litigation before the NLRB, may adopt these rules in whole or in part.

[6] As a result, National alleged that a determination of the lawfulness of the proposed rule under the Shipping Act is a necessary determination which would go beyond the limited issue posed before the NLRB—*i.e.*, whether the rules were or were not an unlawful secondary boycott prohibited by the National Labor Relations Act.

The International Association of NVOCC's (NVO's) alleged basic error by the Commission in our conclusion that the rules on containers are not being enforced becauses of the NLRB decision (upheld by the courts) finding them invalid under the National Labor Relations Act. The NVO's advised that the ILA and the ocean carriers including PRMSA have construed these rulings against

the proposed rules to apply only to New York. The NVO's stated:

> Indeed, as recently as August 16, 1977 six days *after* the Commission's order of discontinuance herein, an article appeared in the Journal of Commerce reporting that the NLRB found the same container rules involved herein unlawful under the National Labor Relations Act at the Ports of Baltimore and Hampton Roads. The rules had been in force up to March 17, 1977 at those ports until an injunction was obtained against those rules . . . .

The NVO's also averred that two of their number were informed "during the early months of 1976" that the NLRB and court decisions applied only to New York and that the rules on containers were in effect in Philadelphia. In fact, the NVO's claim, PRMSA itself refused to furnish containers in the Port of Philadelphia subsequent to the date of the tariff note on which the Commission relied.

[7] The NVO's also urged that we reach a decision on the merits of the rules at issue. The NVO's submitted that the parties to these proceedings and the shipping public deserve a decision by the Commission on the merits of the legality of these rules. This would also allegedly eliminate the need to litigate and relitigate the issues involved each time a party proposes to implement such rules.

Hearing Counsel's Petition for Reconsideration argued that while it may be presumed that PRMSA's tariffs rules were not enforced subsequent to its tariff note, absent any record evidence, the events do not dispose of the need to address the issue of lawfulness of PRMSA's operations prior to the effective date of the note. Hearing Counsel,

accordingly, requested Commission resolution on the merits if for no other reason than to determine whether or not PRMSA's enforcement of the tariff rules for some 16 months violated the Shipping Act. Finally, Hearing Counsel urged that this Commission:

> . . . weigh whether dismissal of this case is consistent with its policy of enforcing the shipping statutes and whether dismissal does not seriously damage the viability and credibility of its enforcement program in the eyes of the shipping industry and the shipping public.

Replies to Petitions

Only PRMSA and Hearing Counsel filed Replies to the Petitions described above. PRMSA's Reply cited two grounds in opposition to reconsideration of this proceeding. First, PRMSA alleged that there is no unfinished business remaining in [8] these dockets because, by notice of cancellation published in its tariff and effective November 6, 1977, PRMSA cancelled its proposed rules.[5] Additionally, PRMSA denied that there should be considered in this proceeding the issue of possible sanctions against it for enforcement of these rules at any time prior to the cancellation. PRMSA alleged that this issue had never been raised within the proceeding until the petition for reconsideration filed by Hearing Counsel, and urges the Commission to maintain this proceeding within its original limitations. If the Commission does so, PRMSA claims, there remains nothing further to be determined in this docket.

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[5] It is to be understood that this notice is not the same as the note at issue in the requests for reconsideration.

Second, PRMSA alleges that no useful purpose would be served by the Commission deciding to proceed further in these dockets. PRMSA urges that the rules at issue in its tariff have been withdrawn; the courts have ruled on the underlying labor agreement provisions and found them unlawful; and PRMSA has acted promptly by appropriate court action to frustrate ILA attempts to enforce the rules. This being so, PRMSA claims that the Commission need not address the merits of the rules further.

PRMSA claims this is not a rulemaking proceeding of general applicability, but is, rather, an inquiry into the lawfulness of tariff rules which are no longer in the tariff. As a [9] result, PRMSA urges that no further action by the Commission is required, and that any such action would simply be pointless.

Hearing Counsel's Reply urges that the Commission not embroil itself in post-record factual questions requiring a reopening of the proceeding. The Reply discusses certain of the procedural difficulties which Hearing Counsel see arising should the Commission determine to delve into post-record considerations. It is Hearing Counsel's position that consideration of such post-record information is unnecessary to deciding the case on the merits and should be avoided.

Hearing Counsel urge avoidance of post-record issues in light of its view of the original objective of the proceeding which they describe as simply a determination of a carrier's duties and obligations under the Shipping Act. Hearing Counsel state:

> If, as we are inclined to believe, . . . the post-trial matters are factual developments which are much more meaningful to understanding the post-record situation

as a matter of labor law or policy, or the subject carrier's status as an employer of union labor, then further development of the post-record matters would appear to be unnecessary to a decision on the basis of the shipping statutes. Moreover, since a speedy resolution of the shipping statute questions would eliminate any uncertainty as to the carrier's obligations and duties under those statutes, it should lessen any conflicts that PRMSA or any carrier may have as a contractual matter under its labor contracts.

Thus, irrespective of the status of any post-record information, Hearing Counsel submit that those issues of carrier responsibility and obligation may be readily determined [10] on the record already available to, and placed before, the Commission. It is Hearing Counsel's view that no consideration of post-record facts will sharpen any of those issues.

DISCUSSION AND CONCLUSION

We have reviewed each petition and reply submitted to us. On the basis of issues raised therein we have reconsidered our decision to discontinue these proceedings and have determined that we must vacate our previous order of discontinuance and enter a decision on the merits of the controversy at issue in this proceeding.

While numerous issues of varying merit were raised, we are of the opinion that the reasoning urged upon us by National is sufficient in its own right to warrant the action taken here. We find persuasive the cases cited by National in support of its claim that the issues regarding the validity of the PRMSA rules are not moot. We find

both the principle of law and the reasoning of National compelling. Further, no party opposing the position of National has pursuaded us to adopt a contrary view.

It is our determination, then, that the public and the parties deserve a ruling by this Commission on the merits of these cases and that law and policy require that we provide such a decision. This we are doing by separate Report and Order, served this date.

[11] THEREFORE, IT IS ORDERED, That our Order of Discontinuance of August 10, 1977 is hereby vacated.
By the Commission.

/s/ FRANCIS C. HURNEY
Francis C. Hurney
Secretary

(SEAL)

APPENDIX G

Order of Federal Maritime Commission Administrative Law Judge Denying CONASA's Motion to Dismiss

Served
June 27, 1973
Federal Maritime Commission

FEDERAL MARITIME COMMISSION
Washington, D. C.

June 27, 1973

No. 73-17

SEA-LAND SERVICE, INC. AND GULF PUERTO RICO LINES, INC.
PROPOSED RULES ON CONTAINERS

MOTION BY CONASA TO DISMISS DENIED;
MOTION CERTIFIED TO FMC;
AND MOTION TO QUASH SUBPENA DENIED

By motion filed June 11, 1973, the Council of North Atlantic Shipping Associations (CONASA) moves for an order dismissing (discontinuing) this proceeding in its entirety, quashing the subpena, dated June 4, 1973, served upon James J. Dickman, and proscribing the taking of the deposition upon oral examination of James J. Dickman.

At the prehearing conference held in this proceeding on June 11, 1973, the Presiding Officer indicated from a cursory look at the motion to dismiss (discontinue) the proceeding that he probably would deny the motion in view of the Commission's order [2] of investigation served April 13, 1973, that he would rule promptly [illegible] written replies to the motion to dismiss were received, and set June 22, 1973, as the date for filing replies. Counsel at the prehearing conference suggested that no matter how the

Appendix G—Order of Federal Maritime Commission Administrative Law Judge Denying CONASA's Motion to Dismiss

Presiding Officer were to rule on the motion to dismiss, that leave to appeal his ruling to the Commission would be sought. It was suggested that in lieu of a ruling by the Presiding Officer that the motion to dismiss be certified promptly to the Commission. Also it was pointed out that the Commission might want a ruling by the Presiding Officer before any ruling were made by the Commission. The Presiding Officer ruled that he would do both, that is, rule on the motion to dismiss, and promptly certify the motion to dismiss to the Commission for whatever action the Commission deemed appropriate.

At the prehearing conference, in view of the above motion to quash, the motion to subpena James J. Dickman was quashed temporarily, and the date for replies to the motion to quash also was set for June 22, 1973.

CONASA's motion to dismiss (discontinue) this proceeding urges that the Federal Maritime Commission lacks jurisdiction over the subject matter of the Rules on Containers, and the administration and interpretation of these rules, since they are work preservation rules and part of the collective bargaining process; that these are [3] matters covered by the National Labor Relations Act, under the jurisdiction of the National Labor Relations Board and the courts; that FMC jurisdiction would have a devastating effect on labor relations in the maritime industry and impinge on labor peace; and that the FMC does not have jurisdiction over labor union and multi-employer bargaining associations and their agreements.

In addition to oral comments at the prehearing conference, written replies to the motion to dismiss were filed by the International Association of NVOCC's, by the New

Appendix G—Order of Federal Maritime Commission Administrative Law Judge Denying CONASA's Motion to Dismiss

York Foreign Freight Forwarders and Brokers Association, and by Hearing Counsel. Respondents, Sea-Land Service, Inc., and Gulf Puerto Rico Lines, Inc., did not file a written reply. At the prehearing conference, it was commented that respondents were between Scylla and Charybdis, in that under interpretations of their labor collective bargaining agreement they ostensibly are obliged to do one thing, and under their existing tariff (not their suspended proposed tariff provisions) they are obliged not to do the same thing.

The proposed suspended tariff provisions impose terms which affect persons other than the collective bargaining parties, including certain consolidators of LTL cargoes. In any event, the proposed tariff provisions apparently will have a very substantial, rather than minimal, effect on the obligations of respondent ocean common carriers to the shipping public, and it appears that findings [4] must be made relative to the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933. In Docket No. 72-51, on June 14, 1973, the Commission decided that a certain assessment formula agreement between the NYSA and the ILA is subject to our jurisdiction. In the present situation in No. 73-17, we have at least equal or better evidence of the Commission's jurisdiction. In any event, the basic facts have not yet been developed fully, and it appears that a proper legal determination of the issues can be made only after the facts have been ascertained. Accordingly, the motion to dismiss (discontinue) the proceeding in No. 73-17 hereby is denied.

In accordance with the parties' request at the prehearing conference, the motion of CONASA dated June 8, 1973, and

Appendix G—Order of Federal Maritime Commission Administrative Law Judge Denying CONASA's Motion to Dismiss

filed June 11, 1973, and the replies thereto will be certified to the Commission for whatever action is deemed appropriate by the Commission.

The motion to quash the subpena and proscribe the taking of the deposition of James J. Dickman is based upon the argument, even assuming that the maintenance of this proceeding is jurisdictionally valid, nevertheless that the deposition is addressed to irrelevant and immaterial matters, namely, the validity of collectively bargained work preservation rules (Rules on Containers) and the motives and subjective intent underlying their adoption. We are [5] not concerned with the validity of the Rules on Containers as they may relate to the laws governing collective bargaining, but we here are concerned with the circumstances and enforcement of the Rules on Containers, and interpretations of these rules as they affect the laws and parties subject to our jurisdictions under the Shipping Act, 1916, and related Acts.

Good cause appearing, the motion to quash the subpena of James J. Dickman is denied, and this subpena is reinstated; and Hearing Counsel shall issue an appropriate new notice of intention to depose, with a new date for the taking of the deposition.

/s/ Charles E. Morgan
Charles E. Morgan
Administrative Law Judge

APPENDIX H

Order of Federal Maritime Commission Denying CONASA's Motion to Dismiss

SERVED
August 28, 1973
Federal Maritime Commission

FEDERAL MARITIME COMMISSION

Docket No. 73-17

SEA-LAND SERVICE, INC., AND GULF PUERTO RICO LINE, INC.—PROPOSED RULES ON CONTAINERS

DENIAL OF MOTION TO DISMISS PROCEEDINGS AND DENIAL OF MOTION TO QUASH SUBPOENA

By motion filed June 11, 1973, the Council of North Atlantic Shipping Association (CONASA) moved for an order dismissing (discontinuing) the proceeding in this docket, and quashing a subpoena dated June 4, 1973, served upon James J. Dickman. Replies to this motion were duly filed by the International Association of NVOCCs, by the New York Foreign Freight Forwarders and Brokers Association, and by Hearing Counsel for the Commission.

CONASA's motion to dismiss this proceeding urged that the Federal Maritime Commission lacks jurisdiction over the subject matter of the proposed Rules on Containers and over the administration and interpretation of these rules since, CONASA claims, these rules are work preservation rules and part of the collective bargaining process; that these are matters covered by the National Labor Relations Act, under the jurisdiction of the National Labor Relations Board and the courts; that FMC jurisdiction would have a devastating effect on labor relations in the maritime industry and impinge on labor peace; and that

the FMC does not have jurisdiction over labor union and multiemployer bargaining associations and their agreements.

[2] CONASA's motion to quash the subpoena issued on James J. Dickman urged that, even assuming FMC jurisdiction over the subject matter of this proceeding, the matters addressed in the subpoena are irrelevant and immaterial; namely, the validity of the collectively bargained work preservation rules (Rules on Containers) and motives and subjective intent underlying their adoption.

The replies to these motions urged that the FMC does, in fact, have subject matter jurisdiction over the matters in this proceeding and that the circumstances surrounding the adoption of the Rules on Containers at issue are indeed relevant and material to this proceeding.

The Administrative Law Judge, after reviewing these various motions and replies thereto, concluded that the proposed Rules on Containers impose terms which affect persons other than the collective bargaining parties and that the proposed rules apparently will have a substantial effect on the objectives of ocean common carriers and the shipping public. To ascertain the impact of their apparent effects, the judge concluded that findings must be made relative to the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, in order to develop fully the facts, and that the proper method of developing such facts was through the present proceedings. As a result, the judge denied the CONASA motion to dismiss the proceeding.

As to the motion to quash, the Administrative Law Judge found that the FMC is duly concerned with the circumstances surrounding adoption of the proposed Rules on Containers, with the enforcement and interpretation of

such rules, and with the effect of such rules upon the [3] laws and parties subject to the jurisdiction of the Commission under the Shipping Act, 1916, and related Acts. The Administrative Law Judge therefore denied the motion to quash.

By agreement of the parties, irrespective of how the Administrative Law Judge rules on these motions, it was determined that his ruling should be certified to the Commission for whatever actions were deemed appropriate. The rulings of the Administrative Law Judge were so certified to the Commission and are before us now.

Having reviewed the record before us, we have concluded that the findings of the Administrative Law Judge are entirely warranted by that record and we see nothing therein which persuades us to overrule his rulings issued on June 27 1973. We concur that the facts relating to the effects of the proposed Rules on Containers, their adoption, enforcement, and interpretation ought to be developed through the avenue of hearings in this procedure. Further, and as an integral part of that development of the facts, we concur with the findings of the Administrative Law Judge that the matters relating to the adoption of the proposed Rules on Containers are matters which affect the laws and parties subject to our jurisdiction and are, therefore, matters which should be pursued by subpoena and deposition.

It Is Ordered, Therefore, That the rulings of the Administrative Law Judge issued on June 27, 1973, in this regard be, and hereby are, affirmed.

By the Commission

/s/ Joseph C. (Illegible)
Assistant Secretary

(Seal)

APPENDIX I

Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

Case Nos. 2-CC-1364; 1365
2-CE-75

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

and

NEW YORK SHIPPING ASSOCIATION, INC.

and

DOLPHIN FORWARDING, INC.

and

SAN JUAN FREIGHT FORWARDERS, INC.

Case Nos. 5-CC-791; 792
5-CC-793; 794

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION ET AL.

and

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

and

HAMPTON ROADS SHIPPING ASSOCIATION

and

TIDEWATER MOTOR TRUCK ASSOCIATION

and

ASSOCIATED TRANSPORT, INC.

and

HOUFF TRANSFER, INC.

Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

Case No. 12-CC-1002; 1004

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1408

and

PUERTO RICO MARINE MANAGEMENT, INC.

and

INTERNATIONAL CONTAINER EXPRESS, INC.

Case Nos. 22-CC-541; 554
22-CE-19; 20

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

and

NEW YORK SHIPPING ASSOCIATION, INC.

and

CONSOLIDATED EXPRESS, INC.

and

TWIN EXPRESS, INC.

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Case No. 5-CC-925; 929

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL.

and

THE TERMINAL CORPORATION

Case Nos. 4-CC-1133
4-CE-55

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1242

and

HILL CREEK FARMS, INC.

Case No. 12-CE-30

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1416, ET AL.

and

CUSTOM BROKERS & FORWARDERS ASSOCIATION OF MIAMI BEACH, INC.

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Case No. 5-CC-889

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1359, ET AL.

and

BECK ARABIA, LTD.

Case Nos. 22-CE-44; 45; 46

NEW YORK SHIPPING ASSOCIATION, INC. AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

and

AMERICAN TRUCKING ASSOCIATIONS, INC. AND TWIN EXPRESS INC. AND INTERNATIONAL ASSOCIATION OF NON-VESSEL OPERATING COMMON CARRIERS

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIC (AND ITS AFFILIATED LOCAL UNIONS) AND ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

WEST GULF MARITIME ASSOCIATION AND SOUTHEAST FLORIDA EMPLOYERS ASSOCIATION AND MOBILE STEAMSHIP ASSOCIATION INC. AND SOUTH ATLANTIC AND GULF DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

Case Nos. 22-CC-806; 807; 808

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (AND ITS AFFILIATED LOCAL UNIONS) AND ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATIONS, AFL-CIO (NEW YORK SHIPPING ASSOCIATION INC. AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS)

and

AMERICAN TRUCKING ASSOCIATIONS INC. AND TWIN EXPRESS INC. AND INTERNATIONAL ASSOCIATION OF NON-VESSEL OPERATING COMMON CARRIERS

Case No. 22-CE-47
(formerly 5-CE-67)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (AND ITS AFFILIATED LOCALS) AND ATLANTIC COAST DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATION AND STEAMSHIP TRADES ASSOCIATION OF BALTIMORE, INC. (AND ITS AFFILIATED MEMBERS)

and

AMERICAN TRUCKING ASSOCIATIONS, INC.

Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

Case No. 22-CE-48
(formerly 5-CE-68)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (AND ITS AFFILIATED LOCALS) AND ATLANTIC COAST DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS AND HAMPTON ROADS SHIPPING ASSOCIATIONS (AND ITS AFFILIATED MEMBERS)

and

AMERICAN TRUCKING ASSOCIATIONS, INC.

Case No. 22-CC-809
(formerly 5-CC-984)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AFL-CIO (AND ITS AFFILIATED LOCALS) AND ATLANTIC COAST DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AFL-CIO (STEAMSHIP TRADE ASSOCIATION OF BALTIMORE, INC.)

and

AMERICAN TRUCKING ASSOCIATIONS, INC.

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Case No. 22-CC-810
(formerly 5-CC-985)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AFL-CIO (AND ITS AFFILIATED MEMBERS AND ATLANTIC COAST DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AFL-CIO AND HAMPTON ROADS DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AFL-CIO (HAMPTON ROADS SHIPPING ASSOCIATION)

and

AMERICAN TRUCKING ASSOCIATIONS, INC.

Bernard Suskewicz, Esq., of Newark, NJ, and *Harvey A. Holzman, Esq.*, of Baltimore, MD, *Bruce A. Harris, Esq.*, of Coral Gables, FL, *Carmen P. Cialino, Jr., Esq.*, of Philadelphia, PA, *Robert T. Kofman, Esq.*, of Philadelphia, PA, *Mary Schuitte, Esq.*, of New York, NY, *Joseph P. Norelli, Esq.*, of Washington, DC, and *James C. Holcomb, Esq.*, of Washington, DC, *Michael Fitzsimmons, Esq.*, of Newark, NJ, for the General Counsel.

Thomas W. Gleason, Esq., of New York, NY, on behalf of Respondent Unions and *Martin Vigderman, Esq.*, of Philadelphia, PA, on behalf of Respondent-Union Local 1242.

Constantine P. Lambos, Esq. and *Donato Caruso, Esq. (Lorenz, Finn, Giardino & Lambos)*, of New York, NY, on behalf of Respondent New York Shipping Assn., Inc.

Francis A. Scanlan, Esq., of Philadelphia, PA, for Respondent CONASA.

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Donald T. Ryce, Jr., Esq. and *Lewis E. Shelley, Esq. (Hogg, Allen, Ryce, North & Blue)*, of Coral Gables, FL, on behalf of Respondent Southeast Florida Employers Port Assn.

Braden Vandeventer, Esq. (Vandeventer, Black, Meredith & Martin), of Norfolk, VA, on behalf of Respondent Hampton Roads Shipping Assn.

Roland Wilder, Jr., Esq. and *David J. Gzesh, Esq.*, of Washington, DC, on behalf of In't Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Intervenor.

J. Alan Lips, Esq., Mark S. Sauter, Esq. and *Thomas R. Schuck, Esq. (Taft, Stettinius & Hollister)*, of Cincinnati, OH, on behalf of American Trucking Assn., Inc., and Tidewater Motor Assn., Charging Parties.

Arthur Lieberstein, Esq., of New York, NY, on behalf of San Juan Freight Forwarders, Inc., Charging Party.

Anthony A. DeSabato, Esq. (Kleinbard, Bell & Brecker), of Philadelphia, PA, on behalf of Hill Creek Farms, Inc., Charging Party.

William L. Auten, Esq. (Blakeney, Alexander & Mechen), of Charlotte, NC, on behalf of Houff Transfer, Inc., Charging Party.

Martin Schneiderman, Esq. and *Felice Busto, Esq. (Steptoe & Johnson)*, of Washington, DC, and *Raymond P. de Member, Esq. (Garson, de Member & Weiner)*, of Fairfax, VA, and *Thomas G. Travis, Esq.*, of Miami, FL, on behalf of Int'l Association of Custom Brokers & Forwarders; Twin Express, Consolidated Express,

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Int'l Container Express, International Association of Non-Vessel Operating Common Carriers, Charging Parties.

Warren M. Davison, Esq. and *Eric Hemmendinger, Esq. (Shawe & Rosenthal)*, of Baltimore, MD, on behalf of Terminal Corporation, Charging Party.

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[1]

DECISION AND SUPPLEMENTAL DECISION

Statement of the Case

JOEL A. HARMATZ, Administrative Law Judge: This consolidated proceeding derives essentially from remand by the Supreme Court of the United States on June 20, 1980, in *N.L.R.B.* v. *International Longshoremen's Association*, 447 U.S. 490, whereby remedial orders of the National Labor Relations Board in *Dolphin Forwarding, Inc.*, 236 NLRB 525 (1978) and *Associated Transport, Inc.*, 231 NLRB 351 (1977) were vacated. Pursuant thereto, said cases were remanded for further consideration of the Board's conclusion in each that the "Rules on Containers" negotiated between the ILA and various steamship associations embodied a secondary objective and hence were banned as "hot cargo" agreements under Section 8(e) and, further, that enforcement thereof resulted in secondary boycotts as set forth in Section 8(b)(4)(B) of the Act.[1]

Pursuant thereto, by Orders dated January 19, February 18, and February 20, 1981, said cases were consolidated with others pending at various administrative or judicial levels which also presented issues concerning the validity of the "Rules on Containers." Thus, the instant proceeding was broadened to include the following:

1. *Consolidated Express, Inc.*, 221 NLRB 956 (1975), enf'd 537 F. 2d 706 (C.A. 2, 1976), cert. den., 429 U.S. 104 (1977).[2]

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[1] Certiorari was granted by the Supreme Court from the Circuit Court of Appeals for the District of Columbia, which at 613 F. 2d 890 (C.A.D.C., 1979), denied enforcement and remanded.

[2] The Second Circuit Court of Appeals which had enforced the violations found by the Board in *Consolidated Express, Inc.*, the

2. *Puerto Rico Marine Management, Inc.*, 245 NLRB No. 171 (1979), and *Beck Arabia, LTD*, 245 NLRB No. 172 (1979), both of which were pending before the Courts of Appeals for the 5th and 4th Circuits, respectively, at the time of the Supreme Court's decision.

3. *Terminal Corporation*, 250 NLRB 8 (1980), which the Board elected to reconsider, *sua sponte*.

4. *Hill Creek Farms, Inc.*, Case Nos. 4-CC-1133, 4-CE-55 and *Custom Brokers & Forwarders Association of Miami, Inc.*, Case No. 12-CE-30, which were pending before the Board at the time of the Supreme Court's Decision on exceptions to decisions of administrative law judges.

[2]

5. Also consolidated with the above cases was a new complaint issued in *American Trucking Association, Inc., et al.*, on February 10, 1981, which formed the predicate for a 10(l) injunction against enforcement of the "Rules on Containers" during the period following issuance of the Supreme Court's Decision.[3]

Pursuant to Order of the Board, on February 24, 1981, on due notice, a prehearing conference was conducted be-

---

lead case treating the "Rules," recalled its mandate and remanded that case to the Board, pursuant to the Supreme Court's decision referred to above.

[3] A 10(l) injunction was issued on February 24, 1981, restraining enforcement of the Rules in all Gulf and Atlantic ports, by District Judge Herbert J. Stern in *Pascarell* v. *N.Y.S.A., et al.*, No. 81-13 (D.N.J.) [.] Judge Stern's ruling was subsequently affirmed by the Court of Appeals for the Third Circuit. No. 81-1308 (May 20, 1981), 107 LRRM 2426.

fore the undersigned. Thereafter, offers of proof were submitted on behalf of the parties requesting further hearing. On March 13, 1981, the undersigned issued an Order to Show Cause as to why certain portions of the submitted offers of proof should not be accepted as fact.[4] Further, on March 19, 1981, the undersigned issued "Rulings on Offers of Proof and Definition of Issues to be Litigated at Hearing",[5] and on March 30, 1981, a "Ruling on Order to Show Cause and Further Definition of Issues to be Litigated at Hearing".[6]

On April 7, 1981, the hearing was opened before the undersigned in New York City, New York. On that date, the parties stipulated that the entire proceeding be decided upon: (1) the existing records in these consolidated cases,[7] (2) certain material on pages 25, 26, and 27 of ALJ Exhibit 4(a), (3) the record certified to the Third Circuit Court of Appeals in *Pascarell* v. *N.Y.S.A., supra,* the recent 10(l) proceeding,[8] and (4) post-hearing submissions of ". . . vari-

---

[4] See ALJ Exhibit 4(a).

[5] See ALJ Exhibit 4(b). Interlocutory appeals were taken from said rulings by the Charging Parties, American Trucking Association[s] and Tidewater Motor Truck Association (ATA-TMTA) and the Respondents.

[6] See ALJ Exhibit 4(c).

[7] Charging Party ATA-TMTA, at said hearing, declined to join said stipulation, reserving solely in the interest of perfecting a further offer of proof. Pursuant to rejection of said offer by the undersigned, ATA duly appealed to the Board, which on June 1, 1981, found merit in ATA's appeal. Accordingly, ATA Exb. 9, consisting of collective bargaining agreements negotiated between ILA and various employer groups in the Port of Hampton Roads, Virginia, during the year 1964, is hereby received.

[8] Joint Exhibit 1.

ous public documents that would include the tariffs and bills of lading on file with the Federal Maritime Commission." [9]

[3] On June 4, ATA-TMTA, and on June 15, 1981, Respondents, respectively withdrew their requests for special

---

[9] Consistent with the aforesaid stipulation, after close of the hearing, the parties jointly stipulated to the submission of certain tariffs involved in the controversy over the "Rules". Accordingly, the record is hereby reopened, and Joint Exhibit 2(A), 2(B), and 2(C); 3; 5(A) and 5(B); 6(A), 6(B) and 6(C); 7, 8; 9; 10(A) and 10(B); 11(A), 11(B) and 12(A) are hereby received.

In addition, on a post-hearing basis, ATA-TMTA offered its proposed Exhibits 1 through 8 inclusive, consisting of tariffs filed with various Federal agencies. Those documents are public in nature and consist of matters of which official notice is taken. Further, they are within the guidelines set forth by the undersigned at the April 7 hearing, assented to by all parties, for the submission of post-hearing evidence. Accordingly, ATA's Exhibits 1 through 8 inclusive are received.

The sole controversy regarding the post-hearing offers relates to two separate submissions proffered [by] the Respondents NYSA, CONASA, and ILA. The first, Respondents' Exhibit 1, was filed on June 15, 1981. It consisted of a certified copy of the North Atlantic Continental Freight Conference Agreement No. 9214 on file with the Federal Maritime Commission. On June 30, 1981, ATA-TMTA filed objections to the receipt of the foregoing as beyond the scope of the stipulation, irrelevant and immaterial. Contrary to ATA-TMT, Respondents' Exhibit 1, together with other submissions of the parties, contributes to the relevant background, is within the contemplated agreement of the parties as to the documents to be offered on a post-hearing basis, and represents a document, as to which official notice might be taken. Respondents' Exhibit 1 is received.

A second submission was made by the Respondent on July 6, 1981, consisting of an affidavit, together with attachments, which are neither self-authenticating nor public documents of which official notice might be taken. On July 9, 1981, counsel for ATA filed a formal opposition to the receipt of this proffer. Accordingly, as Respondents' seek to expand the record as delimited at the hearing to include matter of a testimonial nature, under conditions transcending the agreement of the parties, Respondents' Exhibit 2 is hereby rejected.

permission to appeal the rulings theretofore made by the undersigned which were then pending before the Board. Accordingly, they, too, joined the above stipulation constituting the record herein. Thereafter briefs were filed on behalf of the General Counsel; Charging Party ATA-TMTA; Charging Parties International Association of Non-Vessel Operating Common Carriers, Twin Express, Custom House Brokers aand Forwarders Association of Miami, Inc.; Charging Party Houff Transfer, Inc.; Charging Party San Juan Freight Forwarding, Inc.; Respondents NYSA, CONASA and ILA; Southeast Florida Employer's Port Association; Intervenor American Warehousemen's Association; and Intervenor International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[4] Based upon the stipulated record, together with further rulings theretofore made herein, and upon consideration of the post-hearing briefs, it is hereby found as follows:

Findings of Fact

I. Jurisdiction[10]

Respondent-NYSA and Respondent-CONASA are organizations composed of employers engaged in the interstate and international transportation of freight and commodities which exist for the purpose, *inter alia*, of representing their employer-members in negotiating and

[10] Jurisdictional findings made herein relate solely to Case Nos. 22-CE-44, 22-CC-806, *et al.*, which arise upon a complaint issued on February 10, 1981, on unfair labor practice charges filed by ATA and by Twin Express, Inc. on December 19, 1980. Like findings with respect to the remaining cases have been previously made on full records, and do not bear repeating.

administering collective bargaining agreements with various labor organizations including the I.L.A. and the I.L.A. Atlantic Coast District.

Respondent-West Gulf Maritime Association (WGMA) is an organization composed of employers engaged in the interstate and international transportation of freight and commodities and which exists for the purpose, *inter alia*, of representing its employer-members in negotiating and administering collective bargaining agreements with various labor organizations including I.L.A. and I.L.A. South Atlantic and Gulf Coast Districts.

Southeast Florida Employer's Association (SFEA) is an organization composed of employers engaged in the interstate and international transportation of freight and commodities and which exists for the purpose, *inter alia*, of representing its employer-members in negotiating and administering collective bargaining agreements with various labor organizations including the I.L.A. and the I.L.A. South Atlantic and Gulf Coast Districts.

Respondent-Mobile Steamship Association, Inc. (MSA) is an organization composed of employers engaged in the interstate and international transportation of freight and commodities and which exists for the purpose, *inter alia*, of representing its employer-members in negotiating and administering collective bargaining agreements with various labor organizations including the I.L.A. and the I.L.A. South Atlantic and Gulf Coast Districts.

[5] Respondent-Steamship Association of Baltimore, Inc. (STAB) is an organization composed of employers engaged in the interstate and international transportation of freight and commodities and which exists for the purpose, *inter alia*, of representing its employer-members in

negotiating and administering collective bargaining agreements with various labor organizations including the I.L.A. and the I.L.A. Atlantic Coast District.

Respondent-Hampton Roads Shipping Association (HRSA) is an organization composed of employers engaged in the interstate and international transportation of freight and commodities and which exists for the purpose, *inter alia*, of representing its employer-members in negotiating and administering collective bargaining agreements with various labor organizations including I.L.A. and I.L.A. Atlantic Coast District and Hampton Roads District Council.

The ATA is a trade association composed of 51 state motor carrier trade associations, including TMTA, which in turn are composed of individual motor carriers engaged in the interstate and international transportation of freight and commodities.

Twin Express, Inc. a New Jersey corporation with an office and place of business in North Bergen, New Jersey, has been a Non-Vessel Operating Common Carrier engaged in overseas transportation of freight and commodities.

The International Association of Non-Vessel Operating Common Carriers (IANVOCC) is a trade organization composed of employers including Charging Party Twin Express, Inc., engaged in the interstate and international transportation of freight and commodities by sea.

During the 12-month period ending on or about December 1, 1980, the employer-members of NYSA and CONASA, respectively, in the course and conduct of their above described business operations derived gross revenue in excess of $50,000 for the transportation of freight and commodities from the State of New Jersey and from the

United States of America directly to various foreign countries.

During the 12-month period ending on or about December 1, 1980, the employer-members of the WGMA, in the course and conduct of their above described business operations derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of Texas directly to points outside the State of Texas and from the United States of America directly to various foreign countries.

[6] During the 12-month period ending on or about December 1, 1980, the employer-members of the SFEA collectively, in the course and conduct of their above described business operations, derived gross revenues of $50,000 for the transportation of freight and commodities from the State of Florida directly to points outside the State of Florida and from the United States of America directly to various foreign countries.

During the 12 month period ending on or about December 1, 1980, the employer-members of the MSA collectively, in the course and conduct of their above described business operations, derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of Alabama directly to points outside the State of Alabama and from the United States of America directly to various foreign countries.

During the 12-month period ending on or about December 1, 1980, the employer-members of STAB collectively, in the course and conduct of their above described business operations, derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the

State of Maryland directly to points outside of the State of Maryland and from the United States of America directly to various foreign countries.

During the 12-month period ending on or about December 1, 1980, the employer-members of HRSA collectively, in the course and conduct of their above described business operations, derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of Virginia directly to points outside the State of Virginia and from the United States of America directly to various foreign countries.

During the 12-month period ending on or about December 1, 1980, the employer-members of the IANVOCC collectively, in the course and conduct of their above described business operations, derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of New York directly to points outside the State of New York and from the United States of America directly to various foreign countries.

During the 12-month period ending on or about December 1, 1980, Twin Express, Inc., in the course and conduct of its above described business operations derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of New Jersey directly to points outside the State of New Jersey and from the United States of America directly to various foreign countries.

During the 12-month period ending on or about December 1, 1980, employer-members of ATA, including TMTA, in the course and conduct of their business, derived revenues exceeding $50,000 for the transportation of freight and commodities as between the various states of the United States of America.

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[7] The complaint, as amended alleges, the answer admits and I find that Respondent[s] NYSA, CONASA, WGMA, MSA, STAB and HRSA are now, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and persons engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4) of the Act.

The complaint as amended alleges, the answer admits and, I find that the employer-members of the IANVOCC and subordinate bodies of ATA, including TMTA, are and have been at all times material herein employers engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act and persons engaged in commerce within the meaning of Section 8(b)(4) of the Act.

The complaint, as amended alleges, the answer admits and I find that Twin Express, Inc. is, and has been at all times material herein an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act and a person engaged in commerce within the meaning of Section 8(b)(4) of the Act.

II. The Labor Organizations Involved

The complaint as amended alleges, the answer admits and I find that the International Longshoremen's Association, ILA Atlantic Coast District, ILA Hampton Roads District Council, and ILA South Atlantic and Gulf Districts are and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

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III. The Alleged Unfair Labor Practices

A. *Definitions*

Unitization	—The consolidation of a number of individual items into a larger shipping unit for easier handling. It is also the securing or loading of one or more items of cargo onto a single structure, such as a pallet.
Stripping	—The act of unloading cargo from a container.
Stuffing	—The act of loading cargo into a container.
[8] LCL or Consolidated Container Load	—A container which consists of cargo of more than one shipper or consignee.
FSL	—A container which consists of cargo of a single shipper or consignee.
Shortstopping	—A practice of motor carriers whereby loaded containers are stripped and reloaded into surface trailers.
LTL	—A surface trailer which includes less than a load to capacity *or* cargo of more than one shipper or consignee.

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Bill of Lading	—The contract of cartage between a carrier and shipper, consignee, or their agent, pertaining to cargo transport.
Interchange Agreement	—Agreement between steamship company and shippers, consignees, their agents and trucking companies pertaining to their use of the former's containers.
Tariff	—Rates, services and conditions published by a carrier informing shippers, consignees and their agents as to rates and terms governing cargo transport.
NVOCC	—A Non-Vessel Operating Common Carrier by sea, which is licensed by the Federal Maritime Commission (FMC) to provide ocean transport services. Though they neither own, nor operate ships, they are treated by the FMC as a carrier.
FAK Rate (Freight, All Kinds)	—The discount afforded under tariffs of steamship companies to shippers who consolidate containerized cargo away from the piers. Also referred to as the "consolidators allowance".

[9] House to House —Import maritime trade designation that container be delivered from initial surface shipping point to surface destination without intermediate stripping.

Pier to House —Import maritime trade designation that container stuffed at port of export be delivered to surface destination without intermediate stripping.

House to Pier —Import maritime trade designation that container be delivered from intial surface shipping point to import pier for stripping.

Pier to Pier —Import maritime trade designation that container stuffed at pier on export, be stripped on arrival at pier on import.

B. *Preliminary Statement*

This omnibus proceeding opens a further round of litigation concerning labor restraints upon the utilization of seaborne containers. Hopefully, reconciliation of the issues involved will extend a measure of predictability to labor and industry as to the circumstances under which collective bargaining may dictate lawfully, directly or indirectly, the conditions under which shippers, importers, and their agents must adapt their methods of operation to that tech-

nological advance. Broadly stated the critical issues center upon collision between the provisions of the Act which, on the one hand, protect employee utilization of collective bargaining to preserve their job security, and, on the other hand, those which protect neutral employers from secondary boycotts by interdicting negotiated contracts designed to broaden a job-security dispute beyond the immediate employer.

The various complaints which form the heart of this proceeding are addressed to the so-called "Dolphin Agreement" and its progeny. By virtue thereof, CONASA and the ILA agreed to job guarantees for deepsea ILA labor which imposed limitations upon container handling by others at offshore locations within [10] 50 miles of the Port. This so-called "50-mile rule" has impacted adversely upon container handling practices within various segments of the seaborne transport industry, including freight consolidators, motor carriers, and warehousemen. The latter are within the class, who in this proceeding, seek relief from the "50 mile rule", and join the General Counsel in urging that the "Rules on Containers" possess secondary objectives within the ban of Sections 8(e) and 8(b)(4)(A) and (B) of the Act. Insofar as material, these Sections of the Act provide as follows:

> 8(e) It shall be unfair labor practice for any labor organization and any employer to enter into any . . . agreement, . . . whereby such employer agrees to cease or refrain from handling, using selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered

into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .

8(b)(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, . . . process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or re[s]train any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.* (Emphasis supplied.)

C. *The Issues*

[11] Basically the Rules on Containers in the form negotiated in 1973, allowed containers, both export and import,

to pass over the piers intact if stuffed more than 50 miles beyond the port area in the case of export cargo, or destined in tact [sic] to a point more than 50 miles beyond the port area in the case of import cargo. Also, exempted were those stuffed or stripped within the port by employees of the beneficial owner of the cargo or in the case of import cargo, those stripped by a bona fide warehouse contemplating storage and charges for the cargo for at least 30 days. All containers involved in domestic inter-coastal maritime trade were also exempt. With respect to all others, the Rules awarded deepsea ILA labor the right to stuff or strip containers if that work was to be performed within the 50 mile geographic area of the Port. This work allocation formula was to be enforced by the payment of liquidated damages by Steamship companies in the amount of $1,000 per container for each infraction of the rules, and, more importantly, by a prohibition upon steamship companies from releasing their containers to those engaged in practices in contravention of the Rules.

The challenge to the legitimacy of these rules under the National Labor Relations Act opened with the filing of unfair labor practice charges on June 1, 1973, in *Consolidated Express, Inc.*, 221 NLRB 956, herein referred to as *Conex*, on behalf of two offshore consolidators, engaged, *inter alia*, in the consolidation of export cargo within the 50 mile port area. In that case the National Labor Relations Board, with approval of the Second Circuit Court of Appeals,[11] concluded that the Rules violated Section 8(e), and that their enforcement against the freight forwarders, violated 8(b)(4)(B) of the Act. The issue turned upon whether the

[11] 537 F.2d 706 (C.A. 2, 1976).

objective underlying the Rules was worked [sic] preservation or work acquisition. Broadly stated, a labor organization may legitimately preserve or recapture work traditionally performed within the collective bargaining unit which is threatened or diminished by shifts in the contracting employer's operational methods. On the other hand, negotiated agreements or pressures to force a contracting employer to cease doing business with others runs afoul of the statutory restraints on secondary boycotts where undertaken to acquire new work not formerly performed by represented employees. In the latter context, the contracting employer is a neutral, with the union's real grievance being with non-unit employers whose employees are engaged in the performance of such work. Accordingly, the Board in *Conex,* examined the work sought by the Rules and after contrasting that traditionally performed by waterfront labor [12] with that of the offshore consolidators, rejected the defense urged by the ILA and the New York Shipping Association (NYSA) that the rules merely had the primary objective of preserving work lost by longshoremen. It was reasoned that traditional longshore work had been to load and unload ships, and duties incidental thereto, all of which was performed at the pier. On the other hand, the work in controversy, and claimed by the Rules, was viewed as that traditionally performed by consolidators at offshore locations. Thus, the rules were viewed as an effort by ILA to acquire new work, rather than to preserve that which was historically performed at the pier.

Prior to the Supreme Court's consideration of the Board's position, complaints were issued challenging the

legitimacy of the rules as they applied to NVOCCs,[12] warehousemen who stripped or stuffed containers within the port area[13] and motor carriers that shortstopped containers for stripping at trucking stations within the port area.[14] All of these cases have been consolidated in this proceeding.

Among them, *Associated Transport* and *Dolphin* were reviewed by the Court of Appeals for the District of Columbia Circuit,[15] whereupon enforcement of the Board's orders therein were denied and both were remanded. Certiorari was granted by the Supreme Court. In *N.L.R.B.* v.

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[12] *Dolphin Forwarding, Inc.*, 236 NLRB 525 (1978) herein referred to as *Dolphin; Puerto Rican Marine Management, Inc.*, 245 NLRB 171, and *Custom Brokers and Forwarders Association of Miami, Inc.*, 12-CE-30, JD-147-80, herein called *Custom Brokers*. In this latter case, the ALJ dismissed a complaint alleging that the rules violated 8(e) as applied in the port of Miami. This holding, based upon the ALJ's analysis of traditional work practices in that Port, represents the only exception to otherwise uniform determinations by the Board that the rules were secondary on their face, and as enforced. The Board had not completed its review of that determination prior to remand of that case and its consolidation herewith.

[13] See the *Terminal Corporation*, 250 NLRB 8, herein called *Terminal*, and *Hill Creek Farms, Inc.*, Case 4-CC-1133 and 4-CE-55, JD-188-81, herein called *Hill Creek*. As was true of *Custom Brokers*, the latter was pending on exceptions to the Board, at the time of the Supreme Court's decision. One additional case, *Beck Arabia Ltd.*, 245 NLRB No. 172 (1979) involved an off pier operator, which was also engaged in warehousing cargo, but which traditionally, prior to containerization, had been engaged in packing cargo for export, in large boxes, either owned by it, or supplied by its customers. (See *Shipside Packing*, 227 NLRB 654, 227 NLRB 659).

[14] *Associated Transport, Inc.*, 231 NLRB 351 (1977) herein called *Associated Transport*.

[15] 613 F.2d 890 (C.A.D.C. 1979).

[13] *International Longsoremen's Association*, 447 U.S. 490 a majority of the Supreme Court, speaking through Mr. Justice Marshall, agreed with the District of Columbia Circuit, that the Board had misapplied the work preservation doctrine as enunciated in *National Woodwork Manufacturer's Association* v. *N.L.R.B.*, 386 U.S. 612 (1967), by defining the work in dispute as "the off pier stuffing and stripping of containers", a determination which was viewed as resting too heavily upon the element of "location", at the expense of other factors bearing upon whether, under all the surrounding circumstances, the union's objective was preservation of work for bargaining unit employees, or whether the agreement ". . . [was] tactically calculated to satisfy union objectives elsewhere. . . ." [16]

Pursuant to the remand, and the consolidation orders of the Board, the following issues have been certified in this proceeding:

1. Whether, under more comprehensive examination of controlling principle, the Rules on Containers embody a proscribed secondary objective as seeking to acquire work neither traditionally performed, nor fairly claimable by longshoremen in the primary work units.

2. If not, whether the Rules on Containers nonetheless are to be deemed secondary as imposing an obligation upon signatory employers to guarantee work which they are powerless to assign to their employess.

Said questions strike at the facial validity of the Rules. However, further questions of lesser impact are also presented. First, even assuming that the Rules are upheld as primary, and legitimately enforceable through labor caused

[16] 447 U.S. at 511.

disruption of business relationships, questions remain as to whether their application, in certain circumstances, reflect an expansive interpretation in furtherance of disputes not germane to matters of legitimate interest to the primary work unit.[17]

[14] Finally, this consolidated proceeding includes a new complaint issued by the General Counsel on February 10, 1981, which for the first time is subject to litigation herein. That complaint relates to the action on December 6, 1980, of ILA and various steamship associations operating within ports on the Atlantic and Gulf Coasts in agreeing to reimplement the rules effective January 1, 1981. It raises issues under 8(e) and questions as to whether 8(b)(4)(i)(ii) pressures were invoked for an object proscribed by Section 8(b)(4)(A), as well as 8(b)(4)(B).

Before passing to more substantive areas it is necessary to observe certain unusual qualities concerning this proceeding, which itself encompasses nine separate cases. This vehicle provides an opportunity to resolve the validity of the Rules in all 36 major ports on the Atlantic and Gulf Coasts where longshoremen are represented by the ILA. This undertaking, to the extent influenced by practices be-

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[17] For example, the General Counsel urges that even if the Rules are validated under the work preservation and right of control tests violations nonetheless exist in *Beck Arabia* because the steamship companies involved in that proceeding were not signatory to the rules. A question also is raised by the General Counsel as to the propriety of a critical conclusion by the ALJ in *Custom Brokers*, that two *offshore* consolidators, employing ILA labor, to whom work was directed as a result of ILA pressures, were actually part of the primary work unit. See e.g., *International Longshoremen's Association, Local 1575, AFL-CIO* v. *N.L.R.B.* (San Juan Freight Forwarders), 560 F. 2d 439 (C.A. 1, 1977); *ILA (U.S. Naval Supply Center)*, 195 NLRB 273.

fore and after the advent of modern containers, necessarily turns upon factual development and an existing record confined to the ports of New York, Philadelphia, Baltimore, Hampton Roads, Jacksonville and Miami. This sample includes certain ports where imports constitute the greater percentage of cargo handled, and others where exports exceeded imports substantially. Nonetheless, the record as now constituted is viewed as ample to permit universal findings with respect to the matters in controversy. Differences in the historic development of containerization and work practices in the areas fully examined on the extant records, appear to be insubstantial and fail to suggest any infirmity in this proceeding as an appropriate vehicle for resolution of the controversy on an all-port basis.[18]

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[18] The basic struggle between dock-side and employees of motor carriers, consolidators, and warehousemen, is the same at each port. Many of those engaged at the surface end of the transport system operate on a multi-port basis and others are free to relocate or otherwise pass their containers through ports of their choice. This is exemplified by the Philadelphia experience with respect to the importation of meat products. Thus, "reefers" or refrigerated containers containing frozen meat did not appear in the port of Philadelphia until 1972 or 1973. Initially, all stripping of such containers occurred at port side by ILA labor. As time went by, the ILA allowed reefers to pass intact if designated "House to House" or "Pier to House." However, after the Union took action against certain Philadelphia warehousemen who allegedly violated the 30 day rule, unfair labor practice charges were filed and a 10(l) injunction obtained in June 1979, against enforcement of the Rules in the port of Philadelphia. This injunction had a substantial impact on the work available to longshoremen flowing from the importation of meat from Australia and Venezuela. Thus, prior to the injunction, the port of New York, which had few off shore [sic] cold storage facilities, received over 80 percent of reefers containing imported meat. Of these, some 90 percent were stripped at the pier by deep[-]sea ILA longshoremen. After the injunction issued, the principal port of entry for this product shifted from New York to Philadelphia. Shipments going to the Port of Philadelphia soon

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[15] D. *The Development of Containerization, the Impact of Containerization Upon Longshore Labor, and the Evolution of the Rules on Containers*

Mr. Justice Marshall succinctly defined the sea borne [sic] container technology as follows:

> Containers are large, reusable metal receptacles, ranging in length from 20 to 40 feet and capable of carrying upwards of 30,000 pounds of freight, which can be moved on and off an ocean vessel unopened. Container ships are specifically designed and constructed to carry the containers, which are affixed to the hold. A container can also be attached to a truck chassis and transported intact to and from the pier like a conventional trailer.
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> Before the introduction of containerships, and as is still the case with conventional vessels, trucks delivered loose or break-bulk, cargo to the head of the pier. The cargo was then transferred piece by piece from the truck's tailgate to the ship by longshoremen employed by steamship or stevedoring companies. The longshoremen checked the cargo, sorted it, placed it on pallets and moved it by fork-lift to the side of the ship, and lifted it by means of a sling or a hook into the ship's hold. The process was reversed for cargo taken off incoming ships. With the advent of containers, the amount of on-pier work involved in cargo handling has

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exceeded shipments received at the port of New York. In Philadelphia, however, approximately 90 percent of the "reefers" were stripped off pier.

> been drastically reduced, since the cargo need not be loaded and unloaded piece by piece. The amount of work available for longshoremen has been further reduced by the shipping companies' practice of making their containers available to shippers and consolidators for loading and unloading away from the pier.
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> [16] Containerization, then, was a technological advance of great importance to the shipping industry which at the same time threatened the jobs of longshoremen by dramatically increasing their productivity. As one might expect, the subject has been a hotly disputed topic of collective bargaining between the union and the employers.[19]

Containerization is nothing more than a capital intense and sophisticated means of *unitizing* cargo. The concept of unitizing goods for transport in all probability dates back to the sack devised from animal skin, a means of conveyance which might well predate the wheel. In this sense, containerization is an outgrowth of the most primitive form of human resourcefulness. Although the sack continues as a usable form of unitization, in a more recent era, the drive of man to save his energy, time, and costs, led to the consolidation of cargo in cartons, crates or bound to pallets. Where sea-borne [sic] cartage was involved, whether longshoremen unified the loose cargo at the docks or simply handled it as unitized by the shipper or its agent, depended on a number of factors, including services and facilities offered by the steamship company and the election of the shipper. A clear demarcation between who performed what,

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[19] 447 U.S. at p. 494-496.

when and where in connection with unitized marine cargo is probably one that never was and never will be subject to clear isolation between marine carriers and those who use and complement their services. Nonetheless, cargo prepackaged offshore through various methods utilizing nonmarine equipment, such as railroad cars, prior to and since the development of modern containerization,[20] was almost always allowed to pass over the piers intact even though deep-sea longshoremen possessed the ability and always did in fact perform similar work. Consistent with this practice, the Rules on Containers do not apply to cargo unitized through a shippers' device but only to containers owned or leased by signatory steamship companies. Insofar as the record in this proceeding indicates, adverse reaction on the part of the ILA historically to boxes outside of the scope of this latter limitation was at best isolated, and never an institutional objective. In any event, the historic practices of ILA, to leave undisturbed, cargo unitized through devices owned by non-marine interests is viewed as lending little, if any, aid to resolution of the basic issues in this case.

The advent of the modern container presented the unitization issue in a new light. Materials packed, bound, crated or loaded offshore in a conveyance owned and exclusively held by shippers posed little threat to the traditional ILA work *in the hold* of the vessel. However, [17] the oversea container was not only developed and financed by steamship companies, but its functional utility suggested to long-

[20] It is observed that in the late 1920s, trade between New Orleans and Cuba was serviced by sea-going vessels, specifically designed to carry freight cars without handling of their content on the docks.

shoremen that this innovation did no more than afford the hold of a vessel with inland transferability, thereby threatening not only their work, but removal as well of the physical area that theretofore had been their exclusive work domain. The ILA's indifference to the former may not reasonably be equated with its reaction to the latter.

In tracing this reaction it is noted that the immediate forerunners of the modern container appeared on the waterfront in the late 1940s. The first to appear were the "Conex" and "Dravo" boxes. Both were owned by steamship companies, were reusable, and were customarily 8 feet in length. Initially, both were stripped and stuffed exclusively by deep-sea ILA labor, but later, apparently at request of certain shippers, were made available for offshore stuffing by non-ILA labor.[21]

During the mid 1950s, larger containers ranging from 12 to 20 feet in length appeared in the port of New York. However, until 1957, all were carried on the decks of conventional break-bulk vessels. In 1957, the first specialized container ship appeared in the ports of New York and Jacksonville, Florida.[22]

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[21] It does not appear that the ILA refused to handle these boxes intact, or in any way resist. The practice of the steamship companies to release empty Dravo or Conex boxes to shippers for offshore stuffing, appears to have been limited to Puerto Rican trade routes, and although not specifically delimited by the evidence, it is hardly presumable that this extended to a significant percentage of tonnage when compared with the total volume of break-bulk.

[22] Mechanized equipment for the handling of containers came much later in other ports. Thus, in Philadelphia, Baltimore and Hampton Roads, modern containers did not appear until the mid 1960s, with the first container crane appearing in Philadelphia in 1971, and in Baltimore in 1968.

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The reception afforded by the deepsea dock workers to containerization was one of resistance. The first protest in the form of a grievance emerged in 1958 and arbitration thereof resulted in a ruling against the ILA. Collective bargaining negotiations in 1959 opened with the ILA demanding that all containers be stripped and stuffed on the pier by dockside workers.[23] This was countered by NYSA with a demand that the employers be recognized as possessed of the unqualified right to inaugurate and regulate automated operations. The differences were ultimately resolved [18] by an agreement recognizing the Employer's right "to use any and all types of containers without restrictions or stripping by the Union." But the settlement also included a provision that: "Any work performed in connection with the loading and discharging of containers for Employer-members of NYSA which is performed in the Port . . . whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at the longshore rate." The parties also agreed that a royalty would be paid to union welfare funds with respect to each container passed over the piers intact.

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[23] During the period which coincided with the development of containerization, the ILA sought a change in the basic bargaining format in the industry. Thus, prior to 1956, the ILA and NYSA negotiated agreements in the port of New York and after agreements had been reached in those negotiations, the ILA would bargain with various associations in the other ports. In that year, ILA sought to extend the framework of bargaining to a coast-wide basis. Following a strike, it was agreed that NYSA would execute a master contract on behalf of itself and the other Atlantic ports with respect to certain basic issues. After negotiation of the master agreement, local agreements would be negotiated in the individual ports.

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As a practical matter the 1959 agreement did little to allay unrest. Its term was marked by wildcat strikes in protest of containerization. Employee disenchantment was fanned by ILA's interpretation of the 1959 agreement as only permitting the free movement of those containers which originated beyond the Port area and as not affording the steamship companies any rights with respect to LCL containers. This ongoing dispute led to the issuance of a formal statement to the ILA by NYSA on February 28, 1962, which led to the first accord imposing a restraint on offshore consolidation of containers. In material part, the NYSA conceded as follows:

> Where an employer-member of NYSA supplies a container which is the property of such member, to a consolidator for loading or discharging of cargo in the Port of Greater New York, it will be stipulated that such container must be loaded or unloaded by ILA at longshore rates.

The 1962, contract renewal negotiations, again involved issues concerning job security raised on behalf of ILA, with NYSA seeking full relief from the earlier imposed restrictions. A strike ensued. The Taft-Hartley emergency disputes package was invoked, and a Presidential Mediation Panel headed by Senator Wayne Morris, recommended that a comprehensive study of Manpower Utilization and Security be prepared by the United States Department of Labor within the ensuing term of the [19] new agreement. The parties accepted this recommendation and in consequence no changes were made at that time to the containerization provisions. However, the employers agreed to estab-

lish a guaranteed income plan (GAI) which was the first of its kind in the industry. Here again, the settlement failed to stabilize unrest on the waterfront. Again during its term, longshoremen refused to handle prestuffed containers and in 1966, the ILA sought to reopen the agreement with respect to the container issue. NYSA declined this latter request, but met on a number of occasions with ILA in an unsuccessful effort to resolve the continuing problem.

In the meantime, as of 1967, though containerization had been largely confined to the Puerto Rican trade route, the tonnage of containerized cargo had reached 20 percent of all cargo handled in the Port of New York. That same year, the large North Atlantic trade route, which had previously been served exclusively by conventional bulk cargo vessels, was augmented by the introduction of the first duly containerized vessel by Sea[-]Land Service, Inc., the steamship company that has been dubbed the pioneer of containerization technology. Competitive conditions led many steamship companies to embark on new programs for the building and utilization of specialized container vessels and equipment.

New contract negotiations scheduled for 1968 were preceded by an ILA convention in Miami Beach in 1967 at which a resolution was adopted requiring all containers to be stuffed and stripped by ILA labor at deep sea [sic] rates at waterfront facilities, piers or terminals. ILA opened the 1968 negotiation with a demand tailored to that resolution, and once more containerization had become the major issue dividing the parties. A strike of 57 days ensued in the port of New York, which continued for more than 100 days in certain other ports on the Atlantic and Gulf Coasts. The emergency dispute provisions of the Taft-Hartley Act were

invoked with the board of inquiry defining the issues as follows:

> The two critical issues relate to union-wide collective bargaining and the impact or consequence of containerization and mechanization.

The resulting agreement included a provision making it clear that LCL containers consolidated in the port area were to be stuffed and stripped by ILA labor, at the piers or docks. The specific terms of this restriction are set forth below:

> Containers owned or leased by employer-members (including containers on wheels) container LTL loads or consolidated [20] full-container loads, which are destined for or came from, any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo, and which either comes from or is destined to any point within a 50 mile radius from the center of any North Atlantic District port shall be stuffed and stripped by ILA labor at longshore rates on a waterfront facility under the terms and conditions of the General Cargo Agreement.

At the same time, agreement was reached to increase the GAI contributions.[24]

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[24] Testimony discloses that the "50 mile rule" finds its origin in grievance processing dating back to 1957 in the port of New

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The compromise negotiated in 1969 was not substantially dissimilar and may be said to have codified the position taken by NYSA in its letter to ILA of February 28, 1962. It was recognized that this accord contractually reserved to ILA deep sea [sic] labor only 20 percent of the total containerized cargo handled in New York, with the remaining 80 percent excluded from any ILA stuffing and stripping restrictions.[25]

The 1970s brought about a dramatic increase in containerization.[26] Utilization of containers in new international trade routes continued to broaden.

York. Thus, the term "50 miles from Columbus Circle" had been repeatedly relied upon in resolving grievances and labor disputes during that period. The covered area included the Long Island, New York City, and New Jersey docks which had been historically recognized as encompassing the Port of New York. See Affidavit of Edward J. Heine, Jr., Joint Exh. 1, pp. 1035, 1038.

[25] Intercontinental Container Transport Corporation sought to enjoin enforcement of this version of the Rules based on their alleged illegality under the Anti-Trust laws. The United States Court of Appeals for the Second Circuit, in *International Container Transportation Corp.* v. *New York Shipping Association, Inc., and International Longshoremen's Association,* 426 F.2d 884 (C.A. 2, 1970), concluded that the 1969 Rules were lawful as within the anti-trust exemption for labor agreements. At the same time, the moving party in that proceeding filed unfair labor practice charges with the National Labor Relations Board in Case Nos. 22-CE-12 and 22-CC-389. Those charges were dismissed by the Regional Director for Region 22. Said dismissal was affirmed by the General Counsel of the National Labor Relations Board on October 16, 1970.

[26] It is noted that in an affidavit an expert witness related that "by the end of 1968 more than 50 percent of U.S. imports, and at least around the same percentage of general commodities exports were containerized at off pier facilities." See Joint Exhibit 1, p. 833. These figures are considered suspect in the light of other evidence, including the fact that containerization until 1967 or 1968 was not a major factor at such ports as Philadelphia, Baltimore and Hampton Roads.

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[21] Prior to the 1971 negotiations, certain steamship associations including the NYSA, STAB, HRSA, PMTA, The Boston Shipping Association, Inc. and the Rhode Island Shipping Association, Inc. formed CONASA as a multi-employer bargaining association representing them in negotiations with the ILA on a multi-port basis. Thus, instead of NYSA negotiating the pattern agreement, ILA negotiated such an agreement with CONASA. Said negotiations were confined to wages, hours, welfare contributions, pension contributions, agreement term, containerization and LASH.[27] Other terms and conditions were to be reserved for negotiation locally in each of the separate ports. CONASA was apparently an outgrowth of compromise in response to the Union's demands dating back to 1968 for coast-wide collective bargaining.

The 1971 negotiations resulted in a coast-wide strike, which was enjoined by a Taft-Hartley injunction. Containerization was again the key issue, with ILA not so much concerned with further restrictions on the utilization of containers, but upon methods of assuring that the existing rules were honored uniformly and without their violation being condoned by the steamship companies. The settle-

[27] The specialized container ship was not the only innovative vessel contributing to mechanization on the waterfront. LASH vessels with a "lighter-aboard-ship" can handle approximately 70 barges, carrying about 350 to 500 tons of cargo each, including hundreds of containers. LASH loading productivity averages approximately 1.5 tons per man[-]hour compared with the .5 tons per man[-]hour on a break-bulk vessel, and the 2.54 tons per man[-]hour on a fully automated container ship. A further development was the RO-RO, or roll-on/roll-off ship, the rear section of which includes a ramp which may be lowered to the dock enabling trailers, containers, or other forms of break-bulk cargo to be driven directly off the ship. The productivity of RO-RO operation is 3. tons per man[-]hour.

ment ultimately renewed the contract for a term of 3 years, incorporating the existing rules in the new agreements with minor modifications, including an increase in the royalty payments.

Continuing concern on the part of ILA as to non-enforcement of the Rules dated from their inception in 1968. Finally this problem came to a head in mid-1972, when the ILA, through its president, Thomas W. Gleason, informed NYSA that rule infractions ". . . have now grown to where there is a complete abrogation and disregard of the contract with respect to the loading and stripping provisions . . . ." At that time, notice was served upon participating employers that unless all violations were stopped immediately, the ILA would invoke its [22] contractual right to suspend the Rules, an eventuality which was generally understood as the equivalent of a threat to refuse to handle any containers stripped or stuffed inland. In response, the NYSA informed all steamship carriers and stevedore companies by letter on May 12, 1972, that the Rules must strictly be observed, stating that "The ILA is particularly disturbed by the increased use of consolidators and truckers to perform work which is clearly within the jurisdiction of the ILA under the contract." Despite stepped-up investigation and enforcement efforts by joint labor management committees, the ILA remained dissatisfied with "the spread of consolidation stations operated by steamship carriers as well as those outside the industry" and again threatened a suspension of the Rules. On November 20, 1972, as the number of violations detected by container investigators continued to climb, a meeting was held at the Whitehall Club with management representatives at which the ILA strongly asserted that the supply of containers to consolidators was

a violation of the contract and that all containers would be stopped unless the stevedore contractors and carriers began to live up to the agreement. By virtue of the Whitehall meeting, a document entitled "Enforcement of Rules on Containers" was drafted and proposed for execution by all marine carriers. In January 1973, a meeting of the CONASA-ILA container committee was held in Dublin, Ireland where this document in its final form was adopted as "Interpretative Bulletin No. 1". The new accord is that which is more widely referred to as the "Dublin agreement".

Though its stated purpose was merely the promulgation of rules for the uniform and effective *enforcement* of the Rules on Containers, the Dublin supplement, for the first time, explicitly referred to FSL container stuffed and stripped within 50 miles of the port by other than the beneficial owner's employees. Excluded, however, from the newly defined restriction, was the stripping of FSL cargo by warehouse employees at a *"bona fide"* warehouse where the beneficial owner pays normal warehouse storage fees for a minimum period of 30 days with the beneficial owner retaining title to the cargo for a period of at least 30 days without transfer. The Dublin rules also gave birth to a new means of enforcement; namely, a ban on delivery of containers to those who violate the Rules and with liquidated damages being assessed against [23] participating steamship companies that provided access to containers by consolidators, warehousemen, and motor carriers, who stripped or stuffed them in violation of the Rules.

The 1974 negotiations opened with a retreat by the ILA to its original position, demanding that all stuffing and stripping be performed at the pier facility with deep sea [sic] ILA labor. In the course thereof, the ILA observed that

between 1967 and 1973, deep sea [sic] longshore employment in the port of New York had been reduced by approximately 50 percent in terms of both jobs and man[-]hours lost. CONASA also retreated, by taking the position that all containers should be permitted to move across the pier without restriction by the ILA. The final agreement merely reincorporated the "Dublin Agreement." However, this settlement did not quell ILA's continuing complaint as to violations of the Rules by the steamship carriers. In April 1975, the Rules were suspended by the ILA and all containers in North Atlantic ports were stripped at the piers with the exception of FSL cargo. After a month, the dispute was settled through a further restatement eliminating the warehouse exception with respect to export cargo. With respect to import cargo, that exception required *actual storage* in a bona fide warehouse for a minimum period of 30 days. The restatement also clarified the principle in prior CONASA-ILA decisions that trucking stations where containers are unloaded within the geographic area of the port do not constitute bona fide warehouses with respect to cargo destined for delivery outside the 50 mile area.

The 1977 collective bargaining agreement adopted the Rules without significant modification, with the parties agreeing to a further increase in container royalty payments.

Following the Supreme Court's decision in 1980, on December 6, 1980 the ILA, CONASA, and other steamship associations in the Atlantic and Gulf Coasts agreed to implement the Rules as of January 1, 1980 [1981] in all ports except Philadelphia, where an injunction against the rules was still in effect.

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Looking back at the 13-year period since 1969, it is clear that it marked a steady decline in longshore work. The 1968 agreement was based on accommodation whereby 80 percent of the containerization cargo would be beyond the Rules and permitted to move freely intact without stripping and stuffing at the piers, while the remaining 20 percent of containerized cargo would be stuffed or stripped at the pier. In 1968, the port of New York handled approximately 7 million tons of containerized freight and 12 million tons of break-bulk. In 1974, however, containerized cargo had grown to 19 million tons, while break-bulk had declined to 8 [24] million tons. According to Thomas W. Gleason, Sr., the ILA president, the average daily ILA workforce as of 1975 in the port of New York had declined from the 1968 level of 27,000 men to 8500. According to John Heinz, executive vice-president of NYSA, as of 1980, that figure had been reduced to 7500.

E. The Traditional Work of Deepsea ILA Labor

The historic jurisdiction of pier side longshoremen includes all work in connection with the loading and unloading of cargo on ships, including removal of ocean cargo from the tailgate of the delivery truck[23] to the hold of the

[23] The loading and unloading of trucks at the piers is subject to varying practices. Since 1953, in the port of New York, Longshoremen assisted truckdrivers in loading trucks, but truckdrivers usually unloaded the trucks alone. At Philadelphia, truckdrivers had the option of loading and unloading trucks or of requesting that longshoremen perform these functions. At Hampton Roads, longshoremen actually loaded and unloaded cargo into and out of the trucks. At the very least, however, the jurisdiction of longshoremen began and ended at the tailgate of the truck. These variances are viewed as immaterial. For the loading and unloading of trucks at the piers is viewed as a neutral factor which throws no light upon assessment of the legitimacy of the Rules.

steamship vessel for outbound export cargo including such related intermediate steps as receipt, storage[,] sorting, checking, palletizing, cargo repair, carpentry, maintenance and delivery. With respect to inbound cargo, the dock workers have traditionally performed identical work, but in reverse. As part of its traditional work, deepsea ILA labor has unitized break-bulk cargo for shipment on pallets and in boxes and has broken down unitized import cargo into break-bulk in preparation for its delivery to surface carriers.

The work complement at the piers typically includes terminal labor, ship labor and specialized crafts. Terminal work consist of the receipt, handling and delivery of cargo to and from the truck, railroad car other inland conveyance, and its removal on pallets to points within the pier or terminal. Those termed ship labor work in gangs and are responsible for moving cargo from the dock into the hold of the vessel or on import, from vessel to dock. The craftsmen include checkers who are responsible for tallying cargo and insuring that the receipt and delivery is properly recorded; carpenters, who construct pallets and install dunnage for the proper storage of cargo on the vessel; coopers, who repair broken bags and boxes; clerks, who are responsible for the dock plan and delivery books assuring at all times that all cargo received, delivered, and on hand is accounted for; maintenance personnel and [25] electricians, whose responsibility consisted of maintaining equipment and machinery at the terminal facility.[29]

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[29] Historically, the unit covered by the Rules in the various ports, included various dock workers, clericals, and craftsmen, engaged in the functions described in the above text. Charging Party ATA-TMTA contends that this was not the case in the port of Hampton Roads. The evidence on which ATA-TMTA relies in this regard

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With respect to unitized cargo, the official position of the ILA has laid no claim to handling the contents of shipper-owned receptacles at the piers.[30] Thus, cargo stuffed off pier in railroad cars for shipment intact through specialized vessels has been allowed to pass over the piers without handling by ILA Deepsea labor.[31] On the other hand, since development of the Conex and Dravo boxes to the present, ILA labor at the piers has stripped and stuffed containers. Although the spread of containerization produced offshore operations which reduced the man[-]hours available to

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is inconclusive. ATA Exhibit 9 consists of integrated agreements in the port of Hampton Roads for a term of October 1, 1964 to September 30, 1968. Those agreements do not on their face, as the ATA contends, clearly establish that the port-wide bargaining unit in Hampton Roads was fragmented to establish separate appropriate units. The fact that separate local agreements negotiated along functional lines were signed by individual employers, who may well have been members of Hampton Roads Maritime Association and authorized to bargain by the latter with respect to local conditions affecting their immediate enterprises, does not necessarily compromise the integrity of a more comprehensive multi-employer unit. In any event, the version of the Rules under challenge in this proceeding are those adopted in 1973 and 1980. The contracts in evidence in the *Associated Transport* case (General Counsel's Exhibit 3 and General Counsel's Exhibit 4) plainly reflect that the parties in the basic "preamble" to those agreements have confirmed that they ". . . have heretofore entered into a master contract with respect to wages, hours, the amount of contributions for welfare and pension benefits . . . , and duration of the term for the collective bargaining agreements. . .". Accordingly, the record does not persuade that the Local negotiations prior to 1973 altered the pre-established port-wide bargaining unit.

[30] See *Continental Express*, affidavit of Gleason dated April 19, 1974.

[31] As of 1980, the ILA work force in the port of New York consisted of 12,264. Of this group, some 7500 are hired on a daily basis and rarely reaches the 8000 mark. See Joint Exhibit 1, affidavit of John Heinz, executive vice-president of NYSA.

deepsea ILA labor, the basic skills and duties of the [26] latter have remained unchanged and remain extant within the dock side bargaining units. Physically, certain waterfront installations did change as containerization increased, with steamship companies and terminal operators having constructed many large container sheds at which deepsea ILA labor at pier side process cargo into and out of modern containers.

F. *Work Preservation*

1. The Controlling Authority

The work preservation doctrine is the pivotal reference in reconciling the conflict between the secondary boycott provision of the Act and the statutory policy whereby "... the labor relations questions raised by changes in the means of production are answered by the parties themselves rather than State intervention." *International Longshoremen's Association, AFL-CIO* v. *N.L.R.B. (Dolphin and Houff Transfer)*, 613 F.2d 890, 902 (C.A.D.C. 1979).

Literally, the proscriptive scope of the boycott provisions of the Act are broad enough to include every disruption of business relationships inspired by a labor organization. The guarantee of work under the Rules to ILA, like other collectively bargained restraints on labor saving innovations, has impacted adversely upon business dealings between steamship companies and others, often to the prejudice of the latter. Under well established authority, however, this inevitable consequence will not necessarily support intervention of the Board's remedial process.

Section 8(e) and 8(b)(4)(B) serve "dual Congressional objectives of preserving the right of labor organizations to

bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B.* v. *Denver Building & Construction and Trade Council*, 341 U.S. 675, 692 (1951). The identity of the primary or offending employer is the key to analysis as to which interest prevails. The impact of an agreement upon other employers whose business might be severely affected is incidental and irrelevant to that inquiry. Similarly, a free system of collective bargaining demands that the right of employees to negotiate job preservation agreements not be impeded by the social or economic benefits to be gained within the community by the unrestrained proliferation of a job eroding technology. See *National Woodwork, supra*, 386 U.S. at p. 644. Instead, it is the nature of the contracting union's grievance and the means of its resolution which afford the central focal point. "The touchstone [of lawful primary activity] is whether, under all the surrounding circumstances, the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own [27] employees . . ." or "tactically calculated to satisfy union objectives elsewhere." See *National Woodwork, supra*, 386 U.S. at p. 644-654. These fundamental considerations are interwoven into the guidelines set forth by Mr. Justice Marshall in defining the scope of the instant remand as follows:

> Viewing the work allegedly to be preserved by the Rules from the proper perspective, the Board will be free to determine whether the Rules represent a lawful attempt to preserve traditional longshore work, or whether, instead, they are "tactically calculated to

> satisfy union objectives elsewhere." . . . This determination will, [of] course, by [sic] informed by an awareness of the Congressional preference for collective bargaining as the method for resolving the disputes over dislocation caused by the introduction of technological innovations in the workplace. . . . Thus, in judging the legality of a thoroughly bargained and apparently reasonable accommodation to technological change, the question is not whether the Rules represent the most rational or efficient response to innovation, but whether they are a legally permissable [sic] effort to preserve jobs. 447 U.S. at p. 511.

On the instant record, their can be little question that containerization reduced job opportunities for ILA deepsea labor, and that the Rules represented a negotiated response to accommodate the resulting inroads on ILA work jurisdiction. With this in mind, it is noted that the General Counsel herein appropriately concedes that ". . . it is well settled that unions and employers lawfully may enter into agreements which, . . . entirely prohibit subcontracting of work normally performed or fairly claimable, by employees in the bargaining unit covered by the contract."

At the same time, however, labor organizations may not utilize their strength at the bargaining table to acquire new work not previously performed by them,[32] or work similar to that previously performed in the primary work unit which, though not created by the technology, has been performed traditionally in other sectors by other employees.[33]

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[32] See e.g., *Sheet Metal Workers, Local 223* v. *N.L.R.B.*, 498 F.2d 687, 696 (C.A.D.C. 1974).

[33] *Local Union 282, IBT (D. Fortunato, Inc.)*, 197 NLRB 673 (1972).

Thus, a labor organization though permitted to use the boycott as a "shield to preserve the jobs . . . of its own employees in the unit," may not engage in such action as a sword wielded "to reach out to monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product." See e.g., *National Woodwork, supra,* 386 U.S. at [28] p. 630-631. Furthermore, as cautioned in *N.L.R.B.* v. *Enterprise Pipefitters,* 429 U.S. 507 at p. 529 ftn. 16:

> The distinction between primary and secondary activity does not always turn on which group of employees the union seeks to benefit. There are circumstances under which the union's conduct is secondary when one of its purposes is to influence directly the conduct of an employer other than the struck employer. In these situations, a union's efforts to influence the conduct of the nonstruck employer are not rendered primary simply because it seeks to benefit the employees of the struck employer. *National Woodwork* itself embraced the view that the Union's conduct would be secondary if its tactical object was to influence another employer. . . .

As the foregoing attests identification of the work in dispute is simply "the first and most basic question." [34] It is not dispositive. The inquiry must extend to "all the surrounding circumstances. . . .",[35] including (1) the remoteness of the threat of displacement by the banned product or services, (2) the history of labor relations between the

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[34] *I.L.A.* v. *N.L.R.B.,* 447 U.S. at p. 505.

[35] *National Woodwork, supra,* 386 U.S. at p. 644.

union and the employers who would be boycotted, and (3) the economic personality of the industry.

Of the above factors, the "economic personality of the industry" is the standard of greatest value to the proponents of the instant complaints. For while the detrimental impact of containerization upon ILA employees is clear, the evidence fails to disclose any significant ILA interest in the labor relations of the class of employers boycotted by the Rules.

The economic personality of the industry as it relates to containerization and the Rules has not been explored exhaustively in prior cases. Whatever the dimension of this factor, the vital reference point remains whether the objectives are relevant to the primary work unit, or seek to reconcile differences with other employers. And the economic advantages to be reaped by the technology remain irrelevant under this standard.

The utility of this standard lies in the relevance of industry practices and work patterns to the status of the contracting employer [29] as an offender of the job interests of its own employees. Where technology, automation or new business methods create a general loss of work within an industry, determinations under the Act as to which labor organization may legitimately invoke collective bargaining against their employers, within what limits, and under what circumstances, depends initially upon the role of their employer in the evolution and development of such changes. For where the immediate employer is a stranger to the development of such processes and simply does business with others that have introduced the job saving technique, the former is a neutral whose sole offense to his employees is the maintenance of business relationship[s] with those

who are the true offenders.[36] In such circumstances, the contracting employer has not itself undercut job opportunities and the union's real dispute is addressed to others who did.

On the other hand, where the technology is devised, developed by capital expenditure, or otherwise controlled or expanded upon by the contracting employer different conclusions may obtain. For generally, a labor organization has the right through collective bargaining to restrict the action taken by the contracting employer which reduces benefits within the represented unit. In such circumstances, the immediate employer is the offender. Thus, employees generally are entitled, through the bargaining process, to regulate or resist such forms of managerial judgment by insisting upon their elimination or restriction. However, that right is not unqualified. Restrictions imposed through bargaining upon the unit-spawned technology, even though ostensibly to preserve traditional unit work, may violate the secondary boycott provisions of the Act. Often such provisions create work assignment disputes between separate groups of employees within separate employing entities who have historically performed work not substantially distinct from that which the agreement claims. Just as the ILA could not compensate for job losses due to containerization by acquiring the work of others functionally distinct from that historically performed by them on the piers, the ILA may not compensate for such job losses by reaching out and claiming work of such a character which is and has been indigenous to an entirely different industry which was not created or influenced significantly by the new

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[36] See e.g., *Carrier Air Conditioning Co.* v. *N.L.R.B.*, 547 F.2d 1178 (C.A. 2, 1976) *cert. den.* 431 U.S. 974 (1976); *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (C.A. 9, 1975).

technology. Whether that is the case here requires consideration of the traditional work practices of the ILA against that of the industries adversely affected by the Rules, but only insofar as the economic character [30] of each discloses that ILA is claiming more than the container technology removed from the piers.

2. The Contentions that the Rules Lack a Work Preservation Objective

In support of the complaints, it is contended that through the development of containerization, traditional work of longshoremen has been removed beyond fair claim by the Rules. This view is maintained on what appears to be alternative grounds.

First it is argued that through containerization, a new intermodal transportation system emerged, which is the equivalent of a new product, dispensing with ILA work traditionally performed at seaport terminals. In support of this view, precedent is cited both to the effect that (1) the capacity of ILA represented employees to stuff and strip containers is not dispositive of a work preservation objective,[37] and (2) that work merged or interwoven into a new overall product, outside of the primary work unit, is neither traditional unit work nor fairly claimable.[38] Based

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[37] See e.g., *Local Union No. 282, International Brotherhood of Teamsters (D. Fortunato), Inc.*, 197 NLRB 673 (1972).

[38] See e.g., *Retail Clerks Union Local 324, Federated Department Stores, Inc.*, 235 NLRB 711 (1978), *Plumbers and Steamfitters Local Union 342 (Conduit Fabricators, Inc.)*, 225 NLRB 1364 (1976), remanded, 598 F.2d 216 (C.A.D.C. 1979), on remand, 251 NLRB 794 (1980). See also *Carrier Air Conditioning Co.* v. *N.L.R.B.*, 547 F.2d 1178 (C.A. 2, 1976), cert. denied 431 U.S. 974 and *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (C.A. 9, 1975).

on these authorities, it is argued that, as the handling of containers when performed by consolidators, motor carriers, and warehousemen, has been intermingled with and is incidental to other services which cannot be performed on the pier, the work of the longshoremen has simply disappeared.

It is further urged, in the alternative, that prior to 1973, when the Dublin agreement was reached, the ILA abandoned its claim to both FSL and LCL containers. Thus, it is argued on behalf of International Association of NVOCCs, Twin Express, Inc. and CHBFA, together with the Intervening Teamsters Union, that the 1959 ILA-NYSA agreement, while requiring the payment of a premium to ILA benefit plans, authorized free utilization of all containers without stripping, restuffing or other ILA interference, and hence embodied a waiver of any right with respect to LCL or FSL cargo. Charging Parties Houff Transfer and ATA-TMTA [31] contend that the absence of any negotiated restrictions until 1973 upon FSL cargo evidenced an abandonment by ILA of any claim to such work and acknowledgment by the latter that FSL cargo was not historically within its jurisdiction.

On behalf of Twin Express, the NVOCCs and CBFA of Miami, it is further argued that the 50 mile rule is secondary on its face because (1) ILA had utilized it as an organizational device in one or more ports, and (2) the evidence does not disclose that the work performed by longshoremen at the piers was displaced by that performed by NVOCCs and consolidators.

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3. Conclusions

a. Has the Intermodal Containerization System Produced a New Product Eliminating the Work Claimed by the Rules.

On this record, it must be conceded that longshoremen historically, as an incident to the loading and unloading of vessels at dock side, have not only handled, sorted, checked, and stored break-bulk cargo, but to date have continuously stripped and stuffed modern containers at the pier. At the same time, other segments of the transportation industry, servicing shippers and importers, have performed this identical work offshore. Those antagonistic to the Rules on Containers contend that through containerization, "sweeping" technological changes transformed the maritime industry into one which is intermodal in nature and drastically altered traditional work practices both on and off the piers. It is argued that more than a shift in location at which the work is performed is involved. It is further observed that the convenience with which containers may be interchanged intact between the steamship company, trucking company, warehouses, and beneficial owner of the goods, has created specialized services which are available offshore, an essential element of which is the stuffing and stripping of containers. The industry it is argued has undergone a transformation and the stuffing and stripping of containers performed by longshore employees as an ancillary part of a steamship company's ocean transport system has been eliminated by this new and different service available solely through offshore carriers, which, as the argument goes, no longer relates to the work traditionally and historically performed by longshore employees. In

other words, as stated in the ATA-TMTA offer of proof submitted to the undersigned under date of March 5, 1981:

> The work sought under the Rules is not the same as the old ILA work or functionally related to it because the development [32] of the intermodal transportation system, of which containerization is merely a facet, has so changed the nature and kind of freight transportation process that that [sic] the terminal points of shipment and receipt of cargo now naturally fall, when the customer so dictates, away from old seaport terminals.

The above contention, at least superficially, appears to be another attempt to characterize the work in dispute as that performed offshore and hence to collide with the Supreme Court's criticism of the Board's rationale in *Conex* and related cases. However, to the extent that this argument rests upon viable precedent reconcilable with the rationale of *National Woodwork, supra,* and the instant remand, it warrants consideration. However, the analysis may not lose sight of the basic reference, i.e., whether the Rules on Containers are addressed to the preservation of work in the primary work unit, or whether they are in furtherance of union objectives elsewhere. In this sense at least one aspect of this argument was not addressed by the Supreme Court, but finds support in Board and Court decisions.

Thus, in *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (C.A. 9, 1975), a plumbing subcontractor and union had agreed to a provision requiring fabrication of pipe for specialty units to be performed by the subcontractor's employees. A dispute emerged under this agreement when the employer acquired a sub-

contract for the *installation* of stainless steel surgical scrub stations which included certain prefabricated piping. The Court in finding that the agreement violated Section 8(e) and that the pressure to enforce that agreement violated Section 8(b)(4)(ii)(B) concluded that as the sinks which were manufactured offsite included sophisticated mechanisms, requiring precision tooling on alignment, they constituted a new product entailing work which was beyond that traditionally and historically performed by on-site plumbers. Thus, the objective of the agreement was "... to acquire work performed by employees of ... [the offsite manufacturer]. ..." The real dispute was between the plumbers and the offsite manufacturer, and hence the plumbing subcontractor was a neutral.

A like result was reached in 1976, by the Second Circuit Court of Appeals, on somewhat similar facts in *Carrier Air Conditioning Co.* v. *N.L.R.B.*, 547 F.2d 1178 (C.A. 2, 1976). In that case, an employer association entered an agreement with a local of the sheet metal workers union not to contract out work relating to "plenums, a metal box attached to an air conditioning unit which aids in the abatement of noise, while regulating the flow of air into a room. Later, [33] Carrier, a manufacturer of air conditioning products, developed and produced what was called the "Moduline Air Conditioning Unit." With respect to this product, the plenum was factory installed and integrated into the manufactured product under conditions requiring special equipment and special skills held by Carrier's manufacturing employees. The Union, from the time that the moduline was introduced, opposed its installation within its jurisdiction. In finding that the Union's agreement was unlawful the Court viewed the moduline was [sic]

a new product, which integrated plenums into an overall air conditioning system which entailed precision abrasion work, distinct from that traditionally and historically performed by sheet metal workers. Accordingly, insofar as the subcontracting clause applied to the moduline plenum, the Union was "trying to acquire work performed by employees of Carrier in Tyler, Texas." The Court applied Justice Harlan's observation in *National Wood Work* [sic] *Manufacturer*[*s*] *Association* v. *N.L.R.B.*, 386 U.S. at 648, stating that this is "a case of a union seeking to restrict by contract . . . an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs."

While the *Associated General Contractor* and *Carrier* cases involve reversals or modifications of prior Board decisions, the Board adopted a like rationale to support 8(e) and 8(b)(4)(ii)(B) violations in *Plumbers and Steamfitters Local Union 342, et al., (Conduit Fabricators, Inc.)*, 251 NLRB No. 794.[39] That case involved a so-called union standards clause limiting the subcontracting of certain pipe fabrication work to offsite subcontractors. A general contractor, who was signatory to this agreement, purchased prefabricated cement lined pipe, coated with lead paint, from an Employer, whose employees were represented by a different union, and who worked at standards less than required by the above labor contract. The offsite fabrication of the pipe involved seven steps in the overall processing

[39] This was a supplemental decision, wherein the Board reaffirmed violations initially found at 225 NLRB 1364. However, the Circuit Court of Appeals for the District of Columbia remanded on grounds that it was unable to determine from the Board's decision precisely what work was the subject of the Union's claim on behalf of its members.

of the product, only one of which consisted of work traditionally performed at the job site by employers signatory to the contract. As the steamfitters did not restrict their claim to that work, the Board concluded that steamfitters' claim for the entire fabrication was ". . . an attempt to acquire work which had not previously been performed by unit employees at the job site or in the contractor's shops . . .", and therefore "is work that was not fairly claimable." 251 NLRB at p. 6-7. The Board noted in this connection that "the cutting and welding work is an integral part of the entire fabrication which has not been traditionally or customarily [34] performed by the unit employees at the job site or in the contractors' shops." [40]

In my opinion the *Associated General Contractor* line of cases does not brand the Rules on Containers with secondary flavor. All are distinguishable on material grounds. Each involved a boycotted product (1) which included as an intergral phase, work not previously performed within the unit; and (2) which was related to a technology or operational method developed by employers having no relationship with the contracting unit. A claim for work as against such outsiders seeks to regulate the use by outsiders of their own technology and reduces the status of the contracting employer to a stance of neutrality. Unlike the air conditioning modules, scrub stations and prefabricated pipes, containerization was a technological development originating within and expanded upon by the employers of those within the primary work unit represented by ILA, and it was these same primary employers that thereby sanc-

[40] See also *Retail Clerks Union Local 324, et al. (Federated Department Stores, Inc. d/b/a Ralphs Grocery Company)*, 235 NLRB 711 (1978).

tioned a loss of work historically performed by ILA deepsea labor.[41] The Rules on Containers, insofar as an attempt to regulate a job eroding technology effected by their own employers, are far more germain to the primary work unit than the disputes in the above cited cases.

Equally without merit is the claim that the stripping and stuffing of containers has been integrated into an intermodal system of freight transport so as to defeat any legitimate claim for this work by ILA. In this connection, it is noted that the 50 mile rule is narrowly tailored to the stripping and stuffing of containers. No other work is sought. As was true in *National Woodwork, supra,* the work in controversy herein, was performed historically at the piers by deepsea ILA longshoremen, and elsewhere by either truckers, warehousemen, or consolidators, at inland points. Just how this work loses its identity within the intermodal system is not articulated. There is no *inseparable* integration of these tasks with other labor functions or technology. To the contrary, consolidators and NVOCCs have subcontracted the very work to be performed on the piers under the Rules on Containers, and it is difficult to imagine clearer evidence that the boycotted service possesses a separate limited identity which unlike the labor input into the products boycotted in the *Associated General Contractor* line of cases, is subject to independent performance at a number of locations, under conditions which would fail to defeat intermodal maritime transportation.

[35] Furthermore, it is difficult to perceive clearly the existence of a so-called integrated transport system. The

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[41] *Cf. Retail Clerks Union 770, et al., (Hughes Markets, Inc.),* 218 NLRB 680, 683 (1975).

Rules have been enforced against NVOCCs, consolidators, warehousemen, and motor carriers. While there are exceptions, most of the latter perform separate functions within the surface-to-sea transport system. They, together with freight forwarders (surface and marine), steamship carriers, and custom house [sic] brokers provide important services to shippers and importers engaged in foreign trade. However, the economic personality of the industry is not ossified into a single mold.

Thus, though freight forwarders (or custom brokers in the case of imports), consolidators, trucking companies, NVOCCs, and warehousemen may all be involved in a single shipment in seaborne trade, it is also possible that *none* might be involved. For private shippers, with capacity to prepare their own documentation and to provide transfer to the piers by private surface conveyance may deal exclusively with the steamship company or its port agent. Others may utilize public trucking concerns, warehouses, freight forwarders, NVOCCs, or consolidators, or any combination of these individual operators. With the exception of the steamship company, all employing entities within the intermodal system are dispensable. Hence, the quality of inseparability which existed in the new products considered in the *Associated General Contractors* line of cases is lacking in this proceeding, and accordingly, the challenge to the Rules based thereon is deemed nonmeritorious.

b. Do the Rules Seek Extra-Unit Work Not Created by Containerization

In *National Woodwork, supra,* the Supreme Court expressly reserved on ". . . the questions which might arise where workers carry on a boycott to reach out to monop-

olize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product." 386 U.S. at p. 630-631. Nonetheless, grievances seeking work historically performed by others which in no fashion was created by the immediate employer's action, plainly raise issues beyond the primary work unit and are subject to resolution solely through secondary pressure. In other words, the claim for jobs which bear no causal nexus to the loss of work in the contracting unit, entails an underlying dispute alien to the contracting employers, but addressed to others who employ non-unit personnel to perform identical job tasks. In such instances, primary employees are not subject to ". . . the threat of displacement by the banned product or services. . . ." 386 U.S. at p. 644.

Extension of the boycott prohibitions in such cases not only is in harmony with governing principles, but is salutory in protecting the [36] public against industrial warfare of an irreconcilable nature. For example, the records herein attest to the fact that longshoremen were not the only casualties of the container revolution. A loss of work was also sustained among truckers and offshore dock workers. Yet the work of loading and unloading cargo is functionally indistinct whether the cargo unit be a container, tandem trailer or vessel's hold, and labor organizations representing the offshore employees also have a statutory right to protect their traditional work through collective bargaining. Thus, competing claims may arise through separately negotiated agreements. Dilemmas are avoided through the above interpretation of the work preservation doctrine since controlling effect is afforded to the traditional practices within segments of the affected industries, and historic work patterns not established by the new

technology are frozen and protected against raid by other labor organizations.

In *Local 1976, United Brotherhood of Carpenters* v. *Labor Board (Sand Door)*, 357 U.S. 93, 100, the Congressional purpose underlying the prohibition on secondary boycotts was described as ". . . aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and . . . dangerous practices of unions to widen that conflict. . . ." That end is achieved by deeming secondary, attempts by employees to reach out in compensation for their own job losses by displacement of other employees who have performed substantially identical work historically and without benefit of the causes of displacement in the primary work unit.

The Board has in effect adopted just such a view. Thus, in *Local Union 282, affiliated with the International Brotherhood of Teamsters, et cetera, (D. Fortunato, Inc.)*, 197 NLRB 673, a Teamsters Local had negotiated a provision requiring the driving of trucks to, from or on construction sites to be performed by employees covered by the agreement. The effect thereof was to impede access to job sites by trucks driven by employees of signatory suppliers and subcontractors, who were beyond the primary work unit. In finding that the agreement embodied an unlawful secondary objective, the Board reasoned as follows:

> Finally, we also reject Respondent's argument that the work covered by the clause is, in any event, "fairly claimable" by the unit employees since it is similar to, and requires like skills as, the work which unit employees now and traditionally performed. As already

> indicated, the driving work which the unit employees here perform is considerably more limited than that which they seek to preserve. The fact that the driving of one truck may well be similar to, and require like skills as the driving of any other truck [37] does not persuade us that all driving work is therefore "fairly claimable" by a unit of drivers.

Thus, the inquiry herein does not end simply because the ILA lost work due to their own employer's technology, and the Rules merely restore to the unit, work traditionally performed by ILA. One more element is required before the Rules might be condoned as a legitimate work preservation agreement; namely, that the work claimed is limited to that created, at least substantially, by containerization. Thus, if the Rules simply seek to restore work distributed to offshore employees by containerization, the ILA had a legitimate right to restrict the technology developed by the steamship companies to reclaim or preserve that work. On the other hand, to the extent that the Rules seek to compensate longshoremen for losses at the expense of inland employees whose jobs did not derive from containerization, a proscribed "work acquisition" objective would attach. This determination requires assessment of the economic personality of the various segments of the transport industry affected by the Rules; namely, consolidators, including NVOCCs and their subcontractors; warehousemen; and motor carriers, engaged in container processing within the 50 mile port area. The examination of these operations will place emphasis on the work they performed before and after containerization, and whether such work is independent of, and noncompetitive with, that provided historically by the contracting employers.

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(1) *The Non-Vessel Operating Common Carriers by Sea.*

The NVOCCs may well be the principal beneficiaries of the container revolution. They operate subject to the jurisdiction of the Federal Maritime Commission, and in essence are brokers, engaged in the transportation of seaborne cargo on behalf of shippers pursuant to their own tariffs filed with the FMC.[42] They neither operate at piers, nor employ ILA labor. They solicit their own business and provide no direct services directly to the steamship companies. However, as they do not operate or own ships, they are completely dependent on steamship companies for this aspect of their service.

Although the services provided by the NVOCC to shippers are, in the main, similar to those extended by ocean freight forwarders and custom house [sic] brokers, the NVOCCs have the advantage of being able to [38] issue a single bill of lading covering surface and seaborne transport. In addition, they assume single carrier responsibility under that bill of lading from point of shipment to destination.[43]

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[42] The NVOOC is required to file tariffs with the Federal Maritime Commission and to submit for review by that agency all agreements, fixing rates or otherwise providing for restrictions of competition among person subject to FMC regulations.

[43] The freight forwarder, who is not an NVO, historically and at present provides many of these services to shippers. Ocean freight forwarders are licensed by the FMC, but may not issue a single, through bill of lading and assume no responsibility for cargo while in transit. Unlike the NVO they do not stand in the position of the shipper *vis-à-vis* surface and marine carriers, nor do they stand in the position of carrier in relation to the shipper. The freight forwarder on export, and the custom broker[sic], on import, are the agent for the shipper, and may arrange for inland and marine transportation of cargo to and from the pier as the case may be, while preparing all documentation necessary for the import or the export of cargo whether it be break-bulk, bulk or containerized. The freight forwarder and custom brokers [sic] are at least par-

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The importance of offshore consolidation and the NVOCC increased measurably by containerization. However, such operators contributed nothing in terms of capital investment to the development of that technology. Indeed, it is entirely possible to operate as an NVOCC simply with office space, a telephone, a typewriter, writing paper, a pen and pencil. Good contacts are also helpful. However, a blue collar work force is entirely unnecessary, as the functions of surface transport and freight handling may be performed in their entirety by subcontractors.[44]

The NVOCCs are almost exclusively engaged in the handling of LCL cargo on behalf of small shippers, who otherwise would be required to ship overseas at the higher break-bulk rates appearing in the tariffs of the steamship companies. With respect to freight handling operations, the NVOCC will itself make arrangements, with the shipper for the delivery of freight to a break-bulk station either operated directly by the NVOCC or through a subcontractor in its behalf. At that point, the cargo is sorted and then stuffed, along with break-bulk of other shippers into a single container before delivery to the pier for loading aboard ship.

Among the services provided by NVOCCs for shippers are the following: (1) booking space aboard ocean-going vessels; (2) providing pick-up and/or delivery services for shippers and consignee; (3) inspection, measurement, weighing cargo, and checking cargo to reasonably ascertain

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tially compensated by the steamship companies on a commission basis. The NVOCC receives no form of compensation from the steamship company.

[44] For example, Dolphin Forwarding, Inc. operated entirely on this basis. San Juan Freight Forwarders utilized subcontractors exclusively in certain ports.

that it is the correct cargo as described; (4) separate cargo [39] by destination; (5) assign containers to cargo; (6) stuff cargo into containers for maximum use of container, the safest means of packaging and sequential delivery; (7) seal the container; (8) deliver the container to the pier; (9) issue bills of lading; (10) completion of export documentation including shippers' export declarations, banking documents, and certificate of origin, and (11) advance inland freight charges and collect invoice charges.[45] It is not without significance that ocean freight forwarders, on export, and customs brokers [sic] on import, historically have performed many of these same services. There is also some evidence, that NVOs on instructions from a shipper will provide specialized services in the area of packaging and that they also have some special capacity to trace shipments for the customer while in transit.[46]

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[45] See affidavit of Ernesto J. Sanjurjo, dated January 8, 1981. Joint Exhibit 1, p. 712, 714.

[46] See affidavit of Poul Rosander, dated January 21, 1981. Joint Exhibit 1, p. 695. In his affidavit, Rosander describes work of two customers not suitable for performance at the piers. Neither in my opinion necessarily involves classical NVOCC work. The first relates to imports of FSL containers loaded with paper rolls from Sweden which are susceptible to damage from weather and mishandling. As I construe the affidavit, the work performed by Wilson Container Co., Inc., in connection with those paper rolls was not in the capacity of an NVOCC, but as a warehouseman. Thus, the Rules on Containers as they apply to LCL cargo, would not impede this warehousing function. The second relates to the export of magazines and paperback books to Scandinavia. In this instance, at Wilson's facility, the magazines and books are sorted by destination, palletized, with the palletized loads, then shrink wrapped before stuffing. The argument is made that there are no facilities at the pier enabling the sorting of these goods by hand and the shrink wrapping of them before palletization. Here again, however, the observation seems irrelevant, since FSL, rather than LCL cargo is involved.

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On behalf of the NVOCCs, it is argued that services they provide cannot be duplicated at the piers. It is clear, however, that in many instances NVOCCs do not directly supervise employees engaged in freight handling, but utilize independent contractors in this respect. Furthermore, the breadth and quality of cargo handling services that could be provided at shipside is more a function of that which steamship carriers and marine terminal warehousemen are willing to provide to break-bulk shippers, or indeed, to NVOCCs, than of any unique expertise held by inland operators.

[40] The impact of containerization upon the development of business for the NVOCCs has been dramatic. As stated by Poul Rosander, manager of Wilson Container Co., Inc., which operates in part as an NVOCC:

> "All the services which I have described have been made possible by containerization, and the development of our business was primarily the result of the introduction of containerization into the port of New York." Joint Exhibit 1, pp. 696-697.

To a large extent, this developing sector of the transportation industry was aided and abetted by the steamship companies, themselves. Thus, though the tariffs issued by the latter throughout the development of containerization advertised rates for shipment "pier-to-house" and "pier-to-pier" transport, as well as rates for break-bulk shipment, all of which would require ILA stuffing at the piers, there is evidence that certain steamship companies at the same time discouraged small shippers from dealing directly with them. Thus, there is evidence that shippers were referred by steamship companies to NVOCCs for the shipment of

break-bulk or LCL freight.[47] Furthermore, financial inducements afforded to NVOCCs through the tariffs issued by steamship companies persistently invited charges by ILA that certain steamship companies were undermining the work of longshoremen by providing financial inducements for the avoidance of containerization at the pier. The adverse impact on ILA of these discounts, called the FAK rates, was acknowledged by various representatives of NVOCCs. Thus, as averred by Victor Santos, general manager of San Juan Freight Forwarders, Inc., an NVOCC:

> . . . The rate structure of the steamship companies is such that it discourages the handling of small shipments and the consolidation thereof. Practically, the steamship company rates and charges constitute an embargo for this type of traffic.
>
> In effect, the charge by the NVOCC for a single shipment is less than the charge which would be incurred by a shipper, if the shipment was handled by the steamship company without the intervention of the NVOCC.[48]

An intent on the part of certain steamship companies to divert work from the docks to inland points by virtue of its tariffs is also evident in a [41] statement of Rodolfo A. Catinchi, manager of the Puerto Rican office of Transconex, Inc., an NVOCC, to the following effect:

> . . . In the earlier stages of containerization, NYSA also recognized the longstanding tradition of consoli-

[47] See e.g., affidavit of J.S. McCallie, dated October 10, 1980. Joint Exhibit 1, p. 527, 530.

[48] Joint Exhibit 1, p. 717, 720.

> dating cargo off the docks. This is clearly reflected in the Federal Maritime Board tariffs filed by the NYSA member shipping companies handling containers in the New York-Puerto Rican trade prior to 1959. These official documents show that off-pier consolidation work was not only allowed, but actually was *mandatory* in order to qualify for the tariff rate under which consolidated containers have been and are shipped—namely, Freight-All-Kinds.

Though, perhaps, spurned by the steamship company, the NVOCC is a competitor of the latter in connection with the containerization of break-bulk cargo. For the NVOCC, like the custom house [sic] broker and the freight forwarder, is merely a middleman who provides assistance to shippers for compensation as an indirect carrier with no operating equipment. However, the NVOCC bears the nomenclature of a sea carrier and is regulated by the agency having jurisdiction over elements of the shipping industry. They hold themselves out to the public as a source of seaborne transport and charge rates, derived from tariffs issued by steamship companies, themselves. Hence, they vie with the steamship companies for cargo services that the latter also advertise through published tariffs.

Though the steamship companies may well believe that NVOCCs can provide LCL services to shippers with greater efficiency and profitability, it remains that the former have through collective bargaining contractually bound themselves to preserve certain break-bulk work at the piers for longshoremen. In recognition of said obligation, many steamship companies have developed LCL container stations at dockside, where break-bulk cargo is received, sorted

and stuffed or stripped into containers by deepsea ILA labor. Indeed, certain such facilities are maintained by steamship companies whose fleets are exclusively composed of containerized vessels.

Thus, there can be no question that the steamship companies possess the capacity to handle LCL cargo at pier side and to abide by their obligations to ILA under the Rules. To this extent, the NVOCCs and steamship companies are competitors, and the NVOCCs stuffing and stripping of containers owned or leased by the former is pursuant to a reallocation of work from the piers to offshore facilities created virtually in its entirety by the development of containerization.

[42] Evidence that the consolidators unitized cargo prior to or during the era preceding the Rules does not alter these economic truths. Such evidence does not disclose that such offshore consolidation occurred, in more than trifling amounts, with equipment furnished by steamship companies. For the unitization of cargo beyond the piers on pallets, in trailers, railroad cars or boxes owned by shippers or their agents, is not within the work sought by the Rules on Containers, nor claimed by the ILA as part of their historic work jurisdiction and hence is not suggestive of a relevant, competing offshore work tradition.

Insofar as the Rules claim the offshore stripping and stuffing performed by NVOCCs within 50 miles of the port, it constitutes a rational effort to return to the piers, work diverted by inducements and a technology promulgated by signatory steamship companies and marine terminal operators. As such, the work performed by the NVOCCs, or their agents, to the extent covered by the Rules, was fairly claimable and failed to denude the Rules of a primary

objective for purposes of Section 8(e) and 8(b)(4)(A) and (B) of the Act.[49]

In reaching this conclusion, I have considered the claim made on behalf of the NVOCCs that the threat of displacement by the boycott of off-pier consolidation is too remote to support a primary objective. In this regard, it is argued that the NVOCCs have actually increased traffic to the piers by attracting LCL shippers who would not send loose cargo to the piers. While undoubtedly, there are some LCL shippers that would spurn export trade, it remains a fact that others have not, and that deepsea ILA longshoremen at pierside LCL stations continue to service this very market to date. Beyond that, the arguments made in this respect are highly speculative and certainly the instant records furnish no basis for an inference that ILA deepsea labor has not lost tonnage in substantial quantities to the NVOCCs.

Also without merit is the claim that the 50-mile rule, to the extent that it focuses on NVOCCs within the 50-mile zone, is lacking in rational foundation. As should be evident from the discussion previously [43] set forth, this rule evolved from compromise in the face of crippling strikes. It was designed to preserve for the ILA 20 percent of the containerized freight based on tonnage ratios existing at the time in the Port of New York. It might also be observed

[49] The above conclusion applies with equal force to any offshore consolidators, which are not NVOCC's, but still engage in the stripping or stuffing of LCL containers. Many, if not all, of these consolidators have become NVOCCs. They, as well as the NVOCCs today, may continue to consolidate cargo without ILA interference, so long as the equipment utilized is neither owned nor leased by the direct employers of deepsea ILA labor. However, they as a matter of practical reality are situated identically to the NVOCCs insofar as the above issues are concerned, and the conclusions reached are equally applicable in their case.

that there is some logic to the notion that if consolidation in containers is to be performed within the port area, it just as conveniently could be performed on the pier by longshoremen. In rejecting this contention, the admonition of Mr. Justice Marshall with respect to the scope of the remand is called to mind:

> Thus, in judging the legality of a thoroughly bargained and apparently reasonable accommodation to technological change, the question is not whether the Rules represent the most rational or efficient response to innovation, but whether they are [a] legally permissible effort to preserve jobs.[50]

With respect to the claim that the 50-mile rule is illogical to the extent that it exempts the same work by NVOs performed outside the 50-mile area, it is noted that compromise may at times be arbitrary. In this instance, it is not entirely clear as to whether all NVOs could effectively maintain their competitive posture by functioning beyond the port area. Thus, the 50-mile rule in this sense, may be considered as a deterrent to the threat that NVOCCs present to the traditional work of longshoremen.

While as against NVOCCs and consolidators handling LCL containers within the 50-mile area, the Rules on Containers may not be faulted on work preservation grounds, I would note that not all of the latter are engaged exclusively in that capacity. Thus, trucking operations and/or warehousing operations have established NVOCC divisions, or otherwise engage in LCL container consolidation in conjunction with their performance of other freight distribu-

[50] 447 U.S. at p. 511.

tion services. Irrespective of the findings to be made below with respect to these surface industries, the conclusion heretofore reached is to the effect that a motor carrier or warehouseman *is subject to legitimate application and enforcement of the Rules,* to the extent that the Rules survive the right of control test, and to the extent that such carriers or warehousemen also perform LCL consolidation work allocated under the Rules to deepsea ILA labor.

(2) *The Motor Carriers*

The findings made above with respect to the NVOCCs relate to their status as indirect ocean carriers providing services essentially [44] within the seaborne sector as distinguished from the surface leg of cargo transshipment. Technically, under the ocean bill of lading the container's seaborne journey does not end, at least, until stripped by the NVOCC or its subcontractor. On the other hand, a container released to a motor carrier for delivery to a bona fide warehouse or shipper, generally assumes the character of surface freight and no longer is within the realm of marine cargo. Generally, it is within this framework that work claimed under the Rules affecting motor carriers and warehousemen must be assessed. However, containerization has allowed certain segments of the surface sector to make incursions upon traditional dockside work in a manner unsupported by offshore work traditions. It shall be recognized that in such instances, ILA has the right to protect their historic work jurisdiction by regulating access by others to the technology developed by their employers.

Motor carriers, historically, have maintained terminals or freight stations in the port area. They may offer long-

haul interstate carriage service or intrastate and local cartage service. Generally, with respect to marine cargo, it has been the business practice of motor carriers within their operating areas to pick up export freight at a shipper's facility for delivery to a seaport terminal, and on the import side, to pick up cargo at the seaport terminals for inland delivery.

On the import side, prior to containerization, break-bulk cargo picked up at a seaport terminal by a motor carrier would only be delivered *directly* to the importer if the entire load was consigned locally. If destined beyond the port area or to multiple inland locations, the cargo was delivered to the terminal or freight station where it was unloaded. The break-bulk cargo was then reloaded into over-the-road equipment for delivery to a single consignee beyond the geographic area, or if destined to a number of such consignees, the cargo would be sorted and consolidated according to geographic location with other cargo, and then reloaded for delivery. The practice whereby cargo was returned to freight stations for off-loading, sorting, segregating, and reloading by destination, was a practice which possessed no exclusive relationship to marine trade. Thus, cargo shipped purely on an interstate or continental basis by motor truck, or a combination of railroad and motor truck, is subject to the same handling at terminals and truck stations.

The testimony and arguments on behalf of the motor carriers that containerization did not change these practices seems logically founded and is persuasive. The basic cargo unit in the motor carrier system is the truck or trailer load. With the introduction of containers, [45] the offshore drivers and their helpers, in most ports lost work

themselves, in connection with truck loading operations at pier side. In addition, dock workers employed at trucking stations by motor carriers, after containerization, lost work in connection with FSL containers delivered directly over-the-road to warehouses, consignees, or interlining trucking stations, located beyond the geographic port area. Furthermore, it does not appear that job categories at trucking stations increased in consequence of containerization.

Specifically the Rules on Containers, as thus far applied, have interdicted the practice by the motor carriers of "short-stopping" freight within the 50 mile area. By virtue of this practice, FSL containers are stripped at truck stations and terminals within the geographic area covered by the Rules for a variety of reasons associated with the economics of *surface* transportation. Thus, containerized vessels handle containers of various size including those 20 foot, 35 foot, and 40 foot in length. Over-the-road tractor-trailers are up to 45 feet in length, and therefore have a capacity exceeding that of the modern containers. Interstate carriers will upon occasion strip the smaller containers, consolidate the cargo they contain with other goods destined for the same area and load the consolidated cargo into a 45 foot tractor-trailer. In addition, many interstate carrier systems interchange trailers at inland points for use within a multistate system. Containers have no utility within that system and if transported over the road, would have to be hauled empty back to the port area on a "dead head" run. Short-stopping may also occur because containers may not have been loaded in a safe manner or in compliance with State laws regulating safety of operation on the highways. Other grounds for short-stop-

ping include the fact that motor carrier is required to pay *per diem* charges on containers, a practice which is wasteful while empty trailers sit idle and are subject to utilization without additional operating cost.

Based on the foregoing, it appears that the practice of short-stopping is rooted in traditional motor carrier transport cargo handling procedure, which is performed by motor carriers for their own benefit and convenience. To the extent that containers are handled for such purposes, and not under direction or for the benefit of shippers, consignees or their agents, short-stopping has no relevance to the marine leg of the intermodal network. Although skills utilized therein are indistinct from those of deepsea longshoremen in the performance of their traditional duties, it is work assumed for a different purpose, and in a different segment of the transportation industry. Short-stopping is simply a carrier oriented, as distinguished from consumer oriented service, and as such neither competes with marine cargo handling nor [46] amounts to a subterfuge to oust longshoremen of their traditional work. To this extent, upon delivery of a container to a motor carrier, the seaborne leg ends, the container becomes the substitute for the trialer or van,[51] and work beyond this interface was

[51] Merit exists in the observation by counsel for ATA-TMTA that containerization produced an equipment change which is "chameleon-like" as it passes through various segments of the transport industry. Further, if practices within each industry are to be given full effect in the assessment of whether a particular negotiated agreement is germain to issues within the primary work unit, one must look at the container in terms of the cargo unit it displaced in each sector of the transport system. Thus, while the container may properly be viewed as the equivalent of the hold of the ship, when serviced by those traditionally engaged in the maritime industry, this analogue may not be used to eclipse tradi-

neither created by containerization nor does it make inroads on that traditionally made available to deepsea ILA labor by marine operators.

On such facts, it is found that by application of the Rules to "short-stopping" of import cargo to carriers purely engaged in surface, motor carrier operations, the Rules seek to allay a controversy not with the immediate employers of ILA labor, but with motor carriers in a distinct segment of the transportation system, that have chosen to assign comparable work to their own employees, who have traditionally performed it, even though said offshore work preexisted and was not created by containerization. Such work was not fairly claimable by the units represented by the ILA, and hence to this exent the Rules carry a proscribed secondary objective within the ambit of Section 8(e) and Section 8(b)(4)(B) of the Act.

Beyond that, motor carriers also have stuffed FSL containers for export within the port area. For example, since containerization, certain interstate truckers have stuffed FSL containers at their port area truck stations. Thus, in order to avoid inconvenience attendent in the delivery of empty containers to shippers so as to enable stuffing by the customers' employees and immediate transport to the pier, such cargo will be hauled in trailer loads to the truck station, where it will be stuffed into FSL loads and delivered to the pier.[52] [47] Evidence also exists that at least

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tional practices in other industries not influenced by the same technology. Thus, when one considers traditional business practices in the surface transport industry, it seems only logical that the container, as it passes from marine stage of the journey into the hands of traditional surface conveyance, be treated as the equivalent of the trailer or truck load.

[52] See Joint Exhibit 1, pp. 318, 329.

one carrier stuffed all export FSL containers at its port area truck station because its tractors were incompatible with and were damaged by containers.[53] Although the existing cases do not reflect application on the Rules on Containers to this practice, it is one which would be precluded by their literal terms.

While the question presented here is close, on balance, the stuffing of outbound FSL containers by entities acting purely in the capacity of motor carriers, not as a direct service to customers, but to facilitate their own transport needs, would seem incidental to the movement of surface of freight. As such, the FSL container handling would fall within the framework of traditional motor carrier practice, relative to the preparation of freight for delivery from port trucking station to the piers, as well as the conversion of cargo from over-the-road to local type equipment. If this work is not offered to the public as an available service, or performed under an ocean bill of lading, or on behalf of an NVOCC, ocean freight forwarder or anyone else engaged in services offered by employers of ILA labor, it bears an insufficient relationship to work performed within the marine leg of the transport system, to represent work fairly claimable by deepsea ILA labor. As is true of "short-stopping", application of the Rules in this context is viewed as an attempt to offset job losses on the piers by disrupting inland work patterns not involving work lost by longshoremen in consequence of containerization. The Rules are unlawful under 8(e) to this extent.[54]

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[53] See Joint Exhibit 1, p. 702.

[54] Reconciliation of findings heretofore made is necessary with respect to certain consolidators of LCL freight that might possess

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(3) *The Warehousemen*

[48] The offshore public warehouse has traditionally performed separate functions in the surface distribution phase of domestic and foreign commerce. Freight is not always subject to immediate dispatch from shippers and to importers without necessity for intermediate storage. The public warehouse has filled these needs historically while providing related services as part of a surface system of distribution.

Through the 1973 Dublin agreement, the Rules first adopted provisions specifically restricting the handling of FSL containers by offshore warehouses. In 1975, those Rules were revised to, in effect preclude warehouses from stuffing export containers within the 50 mile area, and

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privately held trucking capability. While it is possible that all of these concerns have become NVOCCs and subject to lawful application of the Rules, those that may still exist and the possibility that similar operations might reappear present a serious threat that traditional maritime work will be diverted to such operations under the guise that consolidation of LCL containers by such firms is within the surface segment of the transport industry. Such a view is enhanced by evidence that, prior to containerization, small trucking firms picked up small loads of break-bulk locally, which were then sorted and consolidated by destination, for reloading and delivery to the piers. Nonetheless, the Rules in this instance are considered legitimate. A genuine potential for subversion of an otherwise legitimate work preservation arrangement calls for application of a rule of reason if the balance between collective bargaining and restraints on secondary activity is to be maintained. If the holdings herein with respect to NVOCCs are affirmed, not only is it probable, but likely that consolidating-trucking firms will fall heir to longshore work lost to marine interests by virtue of containerization. On balance, full interplay of the Act warrants the conclusion that ILA be permitted to enjoy the protection of the Rules as against combined NVO-trucking operators and truckers who offer container stuffing or stripping to the public as an available service.

from stripping import containers within the geographic area, unless the cargo is:

(1) Warehoused at a "bona fide public warehouses";

(2) The consignee pays the normal warehouse charges for a minimum period of 30 or more days;

(3) The cargo is stored for a minimum of 30 days; and

(4) The warehousing occurs in the normal course of business for the qualified consignee with title to such goods not being transferred during the term of storage.

Prior to containerization, import cargo would be picked up at the piers by common carrier, delivered to a warehouse, where a trailer or truck would be unloaded, with the cargo sorted, segregated, palletized, and placed in a designated storage area. Depending upon the consignee's needs, the cargo would be removed from the warehouse, distributed, or delivered. Thus, the public inland warehouse has always provided an intermediate freight distribution service whereby cargo could be stored for a term dictated by the owner's market demand.

To this extent, warehousing practices did not change after containerization. Instead of stripping truck-trailers upon arrival at [49] the warehouse docks, the container was stripped. In this sense, the container afforded no change in the warehousemen's method of handling inbound freight, but simply reflected a change in equipment through which the truck-trailer was supplanted by the container.

The container handling services afforded by warehousemen as outlined above are and have been integrated into

a surface system of transportation, which was not created by containerization, and poses no threat to [the] historic jurisdiction of ILA. As was true of motor carriers, the Rules on Containers as applied to such historic aspects of off pier work constitutes a work acquisition arrangement contemplating seizure of jobs on behalf of ILA to obtain traditional work of others to compensate for their own unrelated job losses.

Nonetheless, the Rules do not seek in *specific* terms to dispossess warehousemen of the container work performed in conjunction with these historic warehouse functions. And indeed some form of contractual restriction upon warehousemen, is not totally alien to legitimate ILA work preservation of objectives. For warehouses have been utilized by shippers and their agents *solely* to perform stripping or stuffing under conditions enabling avoidance of the high cost of performance by ILA at dockside. Provision of such services by warehousemen is tantamount to the establishment of offshore container stations in competition with those at dockside and constitutes an incursion on ILA labor not justified by precontainer warehousing practices. The Rules on Containers may legitimately extend to such practices.[55]

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[55] As heretofore mentioned, practical problems emerge because of the lack of absolute separation of functions among operations within the surface transport system. It has been indicated that some motor carriers combine freight consolidation functions. It is also a fact that motor carriers may also provide warehousing services. Under findings heretofore made, some stripping and stuffing of containers by motor carriers is pursuant to a historic offshore practice confined to that industry and beyond legitimate application of the Rules. However, an opposite result may follow where the identical service is performed by warehousemen. The varied conclusions in this regard, necessarily will encourage a diversion

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[50] The ILA's legitimate concern with respect to offshore warehousing practices is also supported by the fact that time delays in shipment receipt and disperal [sic] is not exclusively an offshore problem. Marine cargo received at the docks is not always immediately transferrable to surface carriers, and outbound cargo delivered to the piers, often must wait for the arrival of a ship. In consequence, marine terminal operators maintain terminal warehouses, where cargo is stored on a *short term basis* pending delivery to carriers or loading aboard ship. With respect to these marine terminals, ILA labor has historically sorted, checked, and handled such freight. Thus, there is an overlap between the capacity of maritime employers and surface warehousemen to provide a similar service at least with respect to short term storage.

Basically, the distinction between the marine terminal warehouse and the inland public warehouse lies in the fact that [the] former represents a resting place pending loading of the vessel and/or release to surface carriers as an incident to marine import or export. On the other hand, inland public warehouses are essential links in a market distribution system which lies on the inland side of the interface between marine and surface carriers.

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of work to combined trucking/warehouse operations, or for that matter to truck stations, to evade the legitimate reach of the Rules and to undermine traditional ILA work jurisdiction. Such readjustments, however, to the extent detectable, will not be effective to frustrate the protective scope of the Rules. For the traditional inland motor carrier practice which is insulated by Section 8(e) from lawful intervention of the Rules is strictly limited, and extends only to those operators engaged purely in motor carrier functions, who strip and stuff containers at their own expense, for their own convenience as motor carriers, rather than for the convenience of shippers, consignees and their agents.

Preservation of this distinction, insofar as it allocates container handling between the separate industries, constitutes a legitimate subject for regulation by ILA through collective bargaining. By virtue of the Rules, such an attempt is apparently reflected in the 30 day clauses, forming the exemption applicable to bona fide warehouses. These restrictions were included in the Rules to prevent warehouses from being used as "drop points" for stripping and reloading immediately onto trucks.[56] However, a serious question exists as to whether they cut too deeply into traditional warehousing practices. Thus, the 30 day charge feature is not unduly restrictive in this sense because warehouses as a matter of practice impose a minimum monthly charge.[57] Accordingly, this enforcement mechanism affords ILA labor no advantage over work performed offshore traditionally by employees of bona fide warehousemen.

[51] On the other hand, consignees of imported goods often utilize inland warehouses to inventory imported goods, as against flexible and unforeseeable market demand. Such practices permit immediate delivery and avoid the delays encountered through a shipment from point of origin on sale, or customer order, method of doing business. It is an integral part of the surface distribution system not generally, duplicated at portside marine operations, and container handling in conjunction therewith, is akin to the historic unloading of trailers at said site. Application of the ILA's 30 day storage limitation so as to preclude a

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[56] See *Hill Creek*, transcript, p. 232, testimony of John Rusta.

[57] See *Hill Creek*, transcript, p. 314, testimony of Vincent D'Arella, Jr.; p. 324, testimony of Lawrence J. Doherty; p. 328, testimony of George Bacon. See also *Terminal*, transcript p. 506, testimony of John Menzies.

consignee's access to warehoused goods in containersize lots is often incompatible with the consignee's need to meet consumer demand, and enforcement of that restriction in such a context serves as an impediment to inland work practices which bear no relationship to services customarily or historically available at pier side.

As indicated, however, offshore warehouses do compete with those operated at marine terminals. Container handling by the former, in the capacity of stripping station or in direct competition with the marine warehouse for short-term storage, is legitimately with [sic] the category of work subject to preservation by the ILA. Since the distinction between container handling which is and which is not rightfully claimable by ILA, insofar as warehousing is concerned, to a great extent is a function of time, the 30 day storage rule is not wholly inapposite to ILA's legitimate claim insofar as it extends to cargo lots no part of which is received by a warehouse for indefinite holding. In this posture, the 30 day storage rule seems a logical basis for distinguishing the historic warehouse function from that which is merely an inland container station established to erode ILA historic work jurisdiction.

One possible example of threat to ILA from the appearance of such cargo handling stations, is evident from the New York-Philadelphia experience in connection with the importation of frozen meats. As a general proposition, marine terminal warehouses do not exist in sufficient quantity to provide *all* importers with market oriented distribution services. Prior to the mid-1970s, however, this was not true in the case of the importation of frozen meat. Historically, the Port of New York was the predominant port of entry for such products, with refrigerated containers or

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"reefers" being stripped at pier side at cold storage warehouses by deepsea ILA labor. As containerization matured inroads on this practice began with the appearance of inland cold storage warehouses in the Port of Philadelphia. However, this pattern exploded in June 1979 when a 10[1] injunction issued against the Rules in that Port. As heretofore indicated, the latter replaced New York as the principal port of entry for frozen meat, and ILA handling of "reefers" at pier side was reduced by 80-90 percent in both ports. This dramatic [52] incursion on ILA man-hours was a direct by-product of containerization and the spread offshore of cold storage warehouses in Philadelphia during the mid to late 1970s, a development which was not supported by a separate inland work tradition. Five operators of such offshore warehouses testified in *Hill Creek*. From their testimony it appears that the first container shipment was handled in a Philadelphia warehouse in 1974, three others received their first shipments in 1975, one in 1976, and the fifth, Hill Creek, in 1978. Here, the conclusion is warranted that the offshore cold storage warehouses in Philadelphia had a dramatic eroding effect on the work opportunities in the primary unit while unaided by a pre-containerization offshore tradition. Accordingly, the 30-day rule insofar as invoked against that practice, was a legitimate attempt to preserve the historically separate pier front, warehousing tradition enjoyed by longshoremen as against a new source of inland competition nurtured by containerization.

The work preservation objective would also exist with respect to restrictions upon certain practices of warehousemen in conjunction with export containers. The Rules insofar as they affect the export of FSL cargo provide no

exceptions, requiring that all to be stuffed within the geographic area, be stuffed at pier side by deepsea ILA labor.

There is evidence that after the advent of containerization, public warehouses, on behalf of shippers, have received trailer loads of cargo from a single shipper and on behalf of the shipper stuffed that cargo into containers without performing any other specialized warehousing service. See e.g., *The Terminal Corporation*, 250 NLRB No. 4.

There is little in the way of evidence suggesting that such a practice existed prior to containerization. The basic surface cargo unit during the pre-container era was the trailer load. The shipper would simply load the carrier's trailer, for direct delivery to the piers. Unless specialized warehouse services were required, involvement of a warehouse in routing would simply add needless expense and time loss.

With certain exceptions, the stuffing of FSL containers by warehousemen, was made practicable solely by virtue of containerization.[52] [53] Thus, warehousemen with access

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[52] Such an exception is evident in the historic operations of Mahon Express, Inc. Mahon for many years has provided warehousing services for certain retail chain stores, including Woolworth, K-Mart and Kreske, which have retail outlets in the Caribbean. These retail chains obtain their inventories from a variety of manufacturers. Instead of maintaining a private warehouse for receipt of such deliveries, insofar as destined for the Caribbean, these chains directed their suppliers to deliver to Mahon. The goods were segregated by Mahon and ultimately loaded into trailers prior to containerization for the delivery to the pier. Subsequent to containerization, Mahon's employees stuffed the cargo into containers for delivery to the pier. A further exception appears in testimony of Poul Rosander pertaining to the stuffing of books and magazines, requiring special processing at the warehouse operated by Wilson Container Co., Inc. See footnote 46, *supra*. Application of the Rules on Containers to such services would transcend any legitimate claim of work preservation. The service provided by Mahon and Wilson, though involved with exports, is

to containers may act as middlemen, whereby shippers need not obtain empty containers and have them stand idle while paying per diem rates pending shipment, but may utilize stuffing facilities of such warehouses in the port area. Where no special services peculiar to the surface warehousing industry are provided or performed in connection with such activity, the work of stuffing the container could as easily be performed at pier-side with ILA deepsea labor. The ban of the Rules on such a practice effectively restores for deepsea longshoremen the work they performed with respect to the cargo prior to containerization when shippers of large quantities of goods delivered full trailer loads directly to the piers. Here again, warehousemen like the NVOCCs who stuff such containers in the port area are engaged in direct competition with employers of deepsea ILA labor who themselves created the technology which fostered the offshore performance of this limited service. The Rules as applied thereto entail a legitimate work preservation objective.[53]

[54] As should be apparent from the foregoing, the scope of the Rules as they apply to warehousemen is not susceptible to singular analysis, nor may they be branded with overarching legality or illegality on a facial basis.

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an incident of traditional shore-side services, conventionally available through inland warehouses, which is not an essential preliminary maritime service. The ILA's claim for this work by virtue of the Rules on Containers is no more in support of fairly claimable work than in the case of importation of FSL cargo for holding and distribution by a full service public warehouse located within the port area.

[53] To the extent that public warehouses consolidate LCL freight in their own behalf or on behalf of an NVOCC or other consolidator, the Rules for reasons heretofore stated, if enforced against them, are consistent with legitimate work preservation objectives.

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Intermediate cargo handling by warehouses is founded upon practices, traditions and methods of operation which vary and do not come [to] bear in unified fashion upon the rights of ILA to preserve its historic work. Like the problem, the solution is less than ideal. Nonetheless, the fact that the Rules do not always focus upon complex business practices with legitimacy is no more reason to foreclose ILA from protecting its historic work than to conclude that ILA should be licensed to monopolize jobs because other work may rightfully be sought as within the realm of "fairly claimable." Instead, the legitimacy of the Rules as they apply to warehousemen handling FSL containers must be resolved on a case-by-case basis, with particular emphasis being placed upon whether the application is in quest of work within the framework of a separate tradition peculiar to offshore warehousing, which has not been created by containerization and which is unrelated to traditional services available to the piers.

c. Has the ILA Abandoned Any Claims to the Disputed Work

The challenge to the lawfulness of the rules on grounds that the ILA abandoned its claim to strip and stuff containers is derived essentially from an alternate theory endorsed by the Board in support of the violations found in *Conex*, 221 NLRB 956. In this regard, prior to the opening of the hearing herein, the undersigned issued "Rulings on Offers of Proof," in which the abandonment issue was rejected as a viable line of inquiry in this proceeding.[40] Nonetheless, the various charging parties persist in their

[40] See ALJ Exhibit No. 4(b), pp. 12-14.

contention that the ILA abandoned any claim to the stripping and stuffing of containers, when in 1959, it settled for premium payments in exchange for the steamship companies right to allow *all* containers to pass over the piers without stripping or stuffing by ILA. A variation of the contention is to the effect that since the ILA sought no relief from the offshore stripping and stuffing of FSL cargo prior to the 1973 Dublin agreement, it must be taken to have waived any right to negotiate such restrictions.

The Board in sustaining such a contention in *Conex,* at 221 NLRB 960, stated:

> Furthermore, assuming that ILA had a superior claim prior to 1959 to the stuffing and stripping work here in controversy, [55] we believe, contrary to the Administrative Law Judge, that it abandoned that claim by its 1959 contract with NYSA. Thus, section 8(a) of that agreement provides that "Any employer shall have the right to use any and all type of containers without restriction or stripping by the union." Plainly, this language is designed to ensure that there would be no restriction on the handling of any type of container, including LTL or LCL containers. The only qualifications specified, which are contained in section 8(b) and (c), provide the *quid pro quo* for this concession. Section 8(b) provides for the payment of royalties on "containers" which ar loaded or unloaded by non-ILA labor away from the pier. Section 8(c) requires that ILA labor be used to perform container work actually performed for NYSA members themselves, whether at their terminals or by their subcontractors. . . .

On review of that Decision, the United States Court of Appeals for the Second Circuit, by divided panel, enforced the Board's Order. However, the majority, limited their approval as follows:

> "We are not similarly impressed with the National Labor Relations Board's other reasons for its order, such as the alleged abandonment by ILA of its claims." [61]

Later the Circuit Court of Appeals for the District of Columbia in *I.L.A.* v. *N.L.R.B., (Houff Transfer, Inc.)*, 613 F.2d 890, pp. 910-911, ftn. 178 (C.A.D.C., 1979), had occasion to consider the question and addressed it as follow:

> "The Board apparently does not rely on this abandonment point in the instant cases, . . . In our view the abandonment point is without merit. We break no new ground when we characterize collective bargaining as "a constant and unending dialogue of powers." . . . As in any dialogue, the most appropriate response can not always be framed instantaneously. Rather, ideas generally develop over time; the best ideas may indeed require the longest gestation periods. Be that as it may, the crucial point here is that the dialogue over how best to assimilate containerization—and, more particularly, the work of stuffing and stripping containers in the port area—into traditional longshore work patterns has never ceased. . . .
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> [56] [T]he issue of containerization has been a key ingredient in ILA-Shipper relationships from the moment of its inception to the present."

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[61] 537 F.2d 706 (C.A. 2, 1976).

"Further, the abandonment point ignores the possibility of recapturing work that, due to technological innovation or managerial initiative, has temporarily escaped from the bargaining unit. . . ."

"A variation on the abandonment theme is offered by Intervenor Houff Transfer, Inc., in the Baltimore and Hampton Roads case, Houff argues that the negotiated Royalty payment provision in the Rules represents a conscious choice on the part of ILA to accept that payment instead [sic] the work of stuffing and stripping FSL containers. . . . The argument is plausible only to the extent that abandonment took place with respect to FSL containers that go directly to their beneficial owners or to a point outside a 50 mile radius of the ports for stripping. The ILA has consistently proven antagonistic the idea that any container can be stripped or stuffed in the port area by other than ILA labor. This hardly amounts to abandonment, the royalty payment notwithstanding. . . ." [42]

While it is the duty of an administrative law judge to adhere strictly to precedent of the Board, such constraints would not seem to apply here. In the wake of the adverse

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[42] On behalf of Charging Party Houff Transfer, Inc., it is argued that the above expression by the Court of Appeals for the District of Columbia rested upon "a *totally* erroneous factual *assumption*." It is argued that the Court, in rejecting the abandonment claim acted on the misapprehension that, prior to the 1973, the Rules contemplated that longshoremen would strip FSL cargo in the Ports of Baltimore and Hampton Roads. Contrary to Houff, it does not clearly appear that such factual considerations in any way influenced the Court, and in any event, the rationale of the Court transcends minor factual issues, in giving realistic effect to collective bargaining as a continuing process.

reaction by the Courts, there is no evidence that abandonment retains any vitality under Board law. The Board's pronouncements since 1975 with respect to the Rules on Containers fail to afford weight to such a concept.[63] Furthermore, [57] although the question was not specifically addressed by the Supreme Court in *I.L.A.* v. *N.L.R.B.*, *supra*, the abandonment theory is difficult to reconcile with Mr. Justice Marshall's seeming endorsement of the view that assertion of a work preservation defense ought not be prejudiced by the fact that negotiated agreements might treat a problem in hesitant fashion. Thus, at 480 U.S. p. 505-506, it was stated as follows:

> One way to preserve the work of the employees represented by the union in the face of such a change is simply to insist that the innovation not be adopted and the work continued to be done in the traditional way. . . . But the protection Congress afforded to work pres-

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[63] The abandonment concept, as a matter of substance, seems inconsistent with the rigid standard firmly embedded in Board policy which is deferred to in interpreting the degree to which a labor organization has relinquished benefits for the term of a collective bargaining agreement. Thus, with respect to this area the Board has for many years, applied the following evidentiary test:

> A waiver is not to be readily inferred and it should be established by proof that the subject matter was consciously explored and that a party has "clearly and unmistakably waived its interest in the matter" and has "consciously yielded" its rights. See e.g., *Century Electric Motor Co.*, 180 NLRB 1051, 1055 (1970).

It seems inconceivable that a more relaxed evidentiary rule would obtain in assessing what issues are a proper subject of bargaining in contract renewal talks. Yet, on the facts presented here, to find an abandonment based the accommodations made by ILA in 1959 and 1968, is to accept substantiation on evidence far less compelling than that which would reasonably reflect a "conscious yielding" in that respect.

> ervation agreements cannot be limited solely to employees who respond to change with intransigence. . . . The work preservation doctrine then, must also apply to situations where unions attempt to accommodate change while preserving as much of their traditional patterns as possible. . . . 480 U.S. at p. 505-506.

The various contentions made by the Charging Parties with respect to abandonment all fail to envision collective bargaining as an ongoing process, through which industrial strife is frequently averted by temporal compromise. They rely on a concept which dictates that labor organizations resist any and all change, even though the foundation for employee fear has yet to materialize.[44] The processes of mediation, conciliation, and fact finding, so vital to protection of the public in the case of national emergency or other major labor disputes would lose [58] utility under so narrow a view of collective bargaining. In sum, the above-quoted expressions of the Courts recognize the proper role of collective bargaining with respect to a technology whose impact, in terms of prejudice and gain of affected employees, might only be measured over a period of time.[45] In the final analysis, the abandonment concept prefers strife to sensible accommodation and has no place

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[44] Note that the first containerized vessel did not appear until 1957, and it was not until 1968 that containerization spread beyond the Puerto Rican trade route. See generally Section III, D of this decision, *supra*.

[45] Section III, D of this Decision, *supra*. Between 1968 and 1975 the average daily work force in the Port of New York declined from a 27,000 to 8500. During that period, the containerized cargo handled in that Port increased from 37 percent to 70 percent. See generally, Section III, D, of this Decision, *supra*.

in the statutory scheme. The contentions based thereon are rejected.

G. *The Right of Control*

In *N.L.R.B.* v. *Enterprise Association of Pipefitters*, 429 U.S. 507 (1977), the Supreme Court confirmed the principle that a labor organization's otherwise legitimate work demands nonetheless entail a secondary objective if the immediate employer is powerless to control assignment of the work sought. This policy is founded on the view that, in such circumstances, the immediate employer is a neutral, pressured by the union solely to force other employers, the true offenders, to relinquish work they assigned to their own employees.[66]

Pursuant to findings heretofore made, the ILA has, in effect, been held to have acted within the ambit of primary work preservation [59] insofar as the Rules on Containers apply within the 50-mile area to (1) LCL container work performed by consolidators and NVOCCs, (2) stripping and stuffing of FSL containers by warehousemen where not

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[66] The right of control test is an invaluable tool in resolving otherwise irreconcilable claims on behalf of competing labor organizations in the face of technological change. As here, such advances may entail a redistribution of work to separately represented groups in different sectors of a particular industry. Each group might possess and on a traditional basis exercise skills indistinct from those required to implement the new technology. It is conceivable that each class of workers could utilize the bargaining process to perfect a claim for all such work simply because they have in the past and continue to perform functionally identical work. As control will rest with only one employer or class of employers, the right of control test enables disposition of such competing claims by branding with legitimacy only those negotiated agreements or boycotts which are ". . . addressed to the labor relations of the contracting employer *vis-à-vis* his own employees." 429 U.S. at p. 528.

performed as an incident to specialized storage-distribution services traditionally performed in that industry, and (3) FSL containers processed by motor carriers pursuant to instruction of or for the immediate convenience of shippers, consignees or their agents. However, consistent with the directive of the Supreme Court in *International Longshoremen Association* v. *N.L.R.B., supra,* further findings are necessary, as indicated below:

> If the Board finds, on remand, that the rules have a lawful work preservation objective, it will then, of course, be obliged to consider the Charging Party's contention that CONASA members did not have the right to control the stuffing and stripping of containers.[67]

Those antagonistic to the Rules argue that the steamship companies and others who are bound thereby lack capacity to assign the work preserved to deepsea ILA longshoremen. Hence, implementing the Rules, is nothing more than the imposition of pressure on signatory employees to reach the true [60] offenders who perform the disputed work with their own employees away from the waterfront. More specifically, it is contended that the shipper, importer or their agents, not the steamship companies, hold control, because it is they who specify the manner in which the containerized cargo is transported both on its sea [sic] ward and surface journey, as well as who strips and stuffs containers. This argument rests on a premise which ignores two critical truths. The first relates to timing and the fact that the choice exercised by shippers, importers and their agents

[67] 447 U.S. at pp. 511-512.

matures only after the technology is made available to them. The second relates to the origin of the technology, and the fact that options made available to shippers, consignees and their agents are not of their own design, but have been made possible by the innovative action of the various employers bound to the Rules. Thus, the oversea container is the main spring of a technology finding its origin within the primary work units. Steamship companies and marine terminal operators have invested their capital and developed the technology which made containers available to the public and which increased their utility through specialized container vessels, container cranes, and other facilities contributing to a dramatically increased productivity on the docks. The wisdom and resources of contracting employers, exclusively, have made this technology available, and shippers, importers, and their agents are simply the beneficiaries, having played no part in the proliferation of this innovative trend. At the same time, the extension of this technology by contracting employers in the form of services offered to shippers, importers and their agents has prejudiced job opportunities of longshoremen. The ILA has responded by negotiating restrictions on release of work required by this technology from pier side to inland labor. Unlike *Enterprise Association, supra,* this was a response to restrain otherwise discretionary action of the immediate contracting employers, who through their development of and control over the job eroding technology, are the primary offenders of the job interests of their own employees. The ILA's effort to preserve their work through negotiated restrictions with respect to whom and under what conditions the container technology is to be released to outsiders relates directly

to a labor relations problem within the primary work unit. Furthermore, as the job guarantees embodied in said Rules take effect as precondition to release of containers, said obligations are imposed upon signatory employers at a time when the latter possess power to comply. In other words, the contractual assignment to ILA operates as a prior restraint upon shippers, importers or their agents who would choose to utilize containers owned or leased by steamship companies in violation of the latter's obligation to deepsea ILA labor. In sum, the element of "shipper's choice" does not preclude a finding herein that ". . . the union was seeking only to regulate the relations between the . . . contractor [signatory employers] and his own employees and to protect a legitimate economic interest of the employees by preserving their unit work." [68]

[61] Notwithstanding, the physical control retained by signatory employers, the proponents of the complaints contend that the national transportation policy administered by the Federal Maritime Commission (FMC) neutralizes that factor by precluding legitimate exercise of such control by the ocean carriers.[69]

Thus, the Shipping Act of 1916, through Sections 16 and 17 thereof, renders it unlawful for any "common carrier by water" to "unfairly treat or unjustly discriminate against any shipper in the manner of . . . cargo space accommodation or other facilities . . .",[70] or to "[T]o make or

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[68] 429 U.S. at p. 519.

[69] This issue requires consideration of research materials to which many labor p.actitioners might not have ready access. Therefore, such material has been reproduced in this decision to a greater extent than otherwise would be necessary.

[70] 46 U.S.C.S. [sic] Section 812 4th.

give undue or unreasonable preference or advantage to any particular person . . . or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . ." [71] Finally, the Shipping Act provides that "every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to, or connected with the receiving, handling, storing, or delivery of property." [72]

These provisions have been construed as precluding ocean carriers from denying services available under their published tariffs to any shipper willing to pay the prescribed charge.[73] Consistent therewith, the FMC has held that enforcement of the Rules on Containers by steamship carriers against shippers or consignees is violative of the Shipping Act of 1916. Thus, in *Sea-Land Service, Inc., and Gulf Puerto Rico Lines, Inc.*,[74] a steamship company (PRMSA) incorporated the Rules on Containers in a tariff filed with the FMC. Administrative Law Judge Charles E. Morgan of the FMC treated the issue as follows:[75]

> [62] . . . The 1916 Act provides in part that no common carrier by water shall make any unfair or unjustly discriminatory contract with any shipper based on the

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[71] 46 U.S.C.S. [sic] Section 815 (1st).

[72] 46 U.S.C.S. [sic] Section 816.

[73] See *Grace Line, Inc.* v. *Federal Maritime Board*, 280 F.2d 790, 792-793 (C.A. 2, 1960) cert. den. 364 U.S. 933; *Swayne & Hoyt, LTD.* v. *U.S.*, 300 U.S. 297, 303 (1937).

[74] FMC No. 73-17, 18 S.R.R. 533 (June 14, 1978).

[75] 16 S.R.R. 315, 338-339.

volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of cargo space accommodations or other facilities.

PRMSA will not supply PRMSA containers to certain consolidators and deconsolidators, whereas PRMSA will supply its containers to other shippers and consignees in the same geographic area. PRMSA's rules on containers unfairly treat and unjustly discriminate against certain consolidators and deconsolidators inasmuch as PRMSA does not provide them the same facilities as PRMSA provides other shippers and consignees. . . .

PRMSA's rules on containers are in violation . . . insofar as these rules permit certain containerloads to move freely over facilities of PRMSA, that is, over the piers, while PRMSA's rules also require other similar containerloads to be stripped and restuffed at the piers by ILA deepsea labor. The unlawful discrimination results from the unequal availability of the piers for movement of containerloads to and from ships.

Clearly, PRMSA's tariff rules on containers unfairly treat and unjustly discriminate against certain shippers and consignees in the matter of cargo space accommodations and other facilities, including the use of the piers and the use of containers for consolidated shipments.

. . . The 1916 Act provides in part that it is unlawful for any common carrier by water to make or give any undue or unreasonable preference or advantage to any person, or to subject any particular person to any

undue or unreasonable prejudice or disadvantage in any respect.

PRMSA's rules on containers are in violation . . . in that they unduly prefer certain shippers and consignees, such as for example, those who have certain facilities and whose employees stuff and strip containers, while these rules subject other shippers and consignees to undue and unreasonable prejudice and disadvantage, such as for example, those shippers and consignees who do not have their own facilities or do not have their own employees to stuff and strip containers. PRMSA's rules require certain shippers to suffer transfer or rehandling charges at the piers for their containers to their undue prejudice, while [63] other shippers escape such transfer charges to their undue preference. . . .

. . . The . . . Act, . . . provide[s] that the common carriers by water in the Puerto Rican trade must provide just and reasonable rates, regulations and practices relating to various matters, including the receiving, handling, transporting, storing or delivering of property; and that if the FMC finds these rates, regulations and practices to be unreasonable, it may prescribe just and reasonable rates, regulations and practices.

PRMSA's rules permit shippers to be held liable for fines or penalties of $1,000 per container, which penalties have no relationship to the cost of transportation or of handling of the container from an ocean transportation viewpoint. These PRMSA tariff rules in part are ambiguous and uncertain in that they are not clear on their face, and are subject to various interpreta-

tions. PRMSA's rules are unreasonable insofar as certain shippers must undergo the added transfer charges, for example, of $172 per 40-foot container, in order to avail themselves of PRMSA's FAK rate on containerloads, when there is no transportation necessity to transfer the contents of a container from one container to another container. PRMSA's rules are unreasonable in a number of other ways, including that they deny containers to some shippers while providing containers to other shippers, and that the rules require certain consignees to warehouse their imports under certain restrictions while not so requiring other consignees to so warehouse their imports. For the reasons stated in this paragraph PRMSA's tariff rules on containers are unjust and unreasonable in violation . . . of the . . . Act. . . .

In *Volkswagenwerk* v. *FMC*, 390 U.S. 261 [8 SRR 20, 109] (1968), the Supreme Court found that a certain agreement among members of the Pacific Maritime Association to impose certain assessments upon member ocean common carriers, stevedores, and terminal operators and their customers was subject to the jurisdiction of the FMC under Section 15 of the 1916 Act. Therein it was stated, at page 278, that we are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU (International Longshoremen's and Warehousemen's Union). [64] CONASA in its opening brief states that in this [sic] *Volkswagenwerk* case the Supreme Court reaffirmed that there is a labor exemption from antitrust statutes for labor agreements which would otherwise be subject

to such antitrust regulation. What the Supreme Court said was that those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, but the Supreme Court went on to say that the assessment arrangement in issue affected only relationships among Association members and their customers. Thus, there was no labor agreement in issue in the *Volkswagenwerk* case.

More importantly, nowhere in *Volkswagenwerk* v. *FMC, supra,* is there any issue of the lawfulness of a tariff rule. Whatever significance that case has to the present investigation possibly may be found in the concurring statement of Justice Harlan. He was concerned about the exact extent of the labor exemption from statutes regulating competition. He pointed out that no collective bargaining agreement was before the Court and that it would be inappropriate to suggest the affirmative extent of the labor exemption or immunity. He went on to say, at page 287, that:

> "the assessment agreement before us is not immune or exempt, for it raises 'shipping' problems logically distinct from the industry's labor problems; at the same time the Commissions review itself must be circumscribed by the existence of labor problems that it is not equipped to resolve."

In the present proceeding, PRMSA's tariff rules on containers raise shipping problems logically distinct from the labor problems which may be raised by the ILA's Rules on Containers. Anytime two shippers

> seeking the same ocean transportation service are treated differently by an ocean carrier, to the extent that one shipper is unduly and unreasonably preferred and the other shipper is unduly and unreasonably prejudiced, there is a shipping problem. The FMC must exercise its jurisdiction over shipping problems.

[65] The decision of the Administrative Law Judge issued on October 9, 1975, but was not adopted by the FMC until June 14, 1978.[76] In affirming the reasoning of the Administrative Law Judge, the FMC stated as follows:[77]

> We are of the opinion that the rules published in PRMSA's tariff were properly found by the Presiding Officer to create an anomalous condition where shippers who are similarly situated in all other transportation respects, are treated decidedly differently. Further, we agree with the Presiding Officer that the existence or not of a collective bargaining agreement which *affects* but is not a part of the transportation aspects of a shipper's relationship with his carrier, need not be given overwhelming priority or weight as a transportation factor by which to justify dissimilarity of treatment. We may agree that such an agreement is a factor to be considered. However, there are other such factors. The mere existence of the collective bargaining agreement does not preempt those other factors or foreclose our consideration of them. For us to adopt the contentions of respondents would be tantamount

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[76] 18 SRR 553, FMC Nos. 73-17, 74-40.

[77] 18 SRR p. 557.

to an acknowledgment by us that a common carrier by water or other person subject to our jurisdiction could escape our jurisdiction by the simple device of voluntarily (albeit with pressure from a union) entering into an agreement which obligates the common carrier to take actions which may be or are in clear violation of the Shipping Act. We do not view the impact of the National Labor Relations Act as permitting a common carrier to disregard entirely its statutory obligations when conducting and resolving labor-management negotiations. We find that upon consideration of the *transportation factors* in the situation created by these rules, including the underlying ILA-CONASA agreement, the disparity of treatment under the rules is not adequately justified.

This is not an adoption of a "per se violation" concept. It is rather, a simple acknowledgment by us that the record in this proceeding shows adoption and implementation of tariff rules which are unjust and unreasonable, and which are unduly and unreasonably prejudicial and disadvantageous because their effects are *unjustified by transportation factors.*

[66] An appeal to the above determination was filed in the Circuit Court of Appeals for the District of Columbia, on August 9, 1978, which to date is still pending.[78]

If the findings heretofore made are tenable, the above ruling by the FMC presents a fundamental conflict between the national labor and transportation policies.

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[78] 20 FMC 788, 20 SRR 553 (1978) appeal pending *sub nom.* CONASA and NYSA v. *FMC and USA,* C.A.D.C. No. 78-1776.

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Respondents contend, however, that the FMC ruling should not be given effect, since rendered obsolete by Congress' supervening enactment of the Maritime Labor Agreement Act (MLAA) on August 8, 1980. It is observed that by virtue thereof the *Sea-land* ruling has been superceded [sic] by a new proceeding before the FMC which will address the questions previously litigated before that Agency as well as the newly enacted statutory exemption.[79]

First with respect to the new proceeding before the FMC, it appears that the focus of this investigation relates exclusively to the reimplementation of the Rules on January 1, 1981, by steamship companies, and by practices engaged in pursuant thereto which might be violative of the Shipping Act. It does not clearly appear that said proceeding is intended as a vehicle for FMC reconsideration of *Sea-Land Service, Inc.* and *Gulf Puerto Rican Lines, Inc., supra.* On the contrary, the FMC's 1981 Order of Investigation might be interpreted as predicated on that very authority. Thus, as stated at page 3 of said Order:

> "The activities described herein appear to be essentially service restrictions and/or the imposition of additional charges which must be reflected in the carrier's tariffs. Moreover, the Commission has in the past found similar practices to be a proper subject matter for ocean carriers' tariffs. *Sea-land Service, Inc.* and *Gulf Puerto Rico Lines, Inc.—Proposed Rules on Containers* and *Puerto Rico Maritime Shipping Authority—Proposed ILA Rules on Containers,* 20 FMC 788, 20 SRR 553

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[79] *The "50-mile Container Rules", Implementation by Common Carriers by Water Serving the Atlantic and Gulf Coast Ports of the United States—Possible Violations of the Shipping Act, 1916, and the Inter-coastal Shipping Act, 1933;* Order of Investigation February 3, 1981, Docket No. 81-11.

(1978), appeal pending *sub nom.* CONASA and *NYSA* v. *FMC and USA*, D.C. Cir. No. 78-1776. Thus, if the carriers named as Respondents have engaged in any of the practices described herein, then the failure of the carrier to effect those paragraphs in their tariffs would appear to [67] violate the following requirements of Section 18(b) of the Shipping Act, 1916, and/or Section of the Intercoastal Shipping Act, 1933. An investigation is therefore necessary to determine whether the carriers have in fact engaged in these practices."

Furthermore, it also does not clearly appear as the Respondents suggest, that the MLAA ". . . exempts labor accords like the Rules on Containers, from unsettling regulation under federal shipping laws." On the contrary, the provisions and legislative history of the MLAA strongly suggest that the FMC retained jurisdiction over claims arising under the anti-discrimination provisions of the Shipping Act, even though the practices complained of might derive from or be dictated by a collective bargaining agreement.

Thus, said amendment to the Shipping Act arose against a background in which the FMC had historically spurned jurisdiction over review of labor agreements. Consistent with this stance, the FMC considered further legislation necessary in light of judicial decisions which indirectly, under Section 15 of the Shipping Act[80] required prior ap-

[80] Section 15 of the Shipping Act, provides, in material part that persons subject thereto file with the FMC "every agreement":

"fixing or regulating transportation or fares; giving or receiving special rates, accommodations, or other privileges or advantages; controlling, regulating, preventing or destroying competition, . . . limiting or in any way the volume or

proval by FMC of maritime collective bargaining agreements.[81] The problem was outlined by one commentator during the Senate Committee hearing, as follows:

> [68] As a consequence of Supreme Court decisions, collective bargaining agreements and related agreements among multi-employer bargaining associations which implement collective bargaining agreements are now considered agreements which must be filed with the FMC for approval. The FMC may also impose penalties and award reparations against individual members of these multi-employer associations for practices arising out of or based upon collective bargaining agreements if the FMC finds the practice in question to be in violation of any provisions of the 1916 act.
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> Presently, the FMC does not require section 15 filings for collective bargaining agreements and relies upon its general exemption authority in the Shipping

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character of freight . . . to be carried; or in any manner providing for an exclusive, preferential, cooperative working arrangement.

* * *

Any arrangement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellation shall be lawful only when and as long as approved by the Commission; . . . . " 46 U.S.C. Section 814.

[81] Previously, in 1968, the Supreme Court in *Volkswagenwerk* v. *F.M.C.*, 390 U.S. 261 mod. 393 U.S. 901 (1968), held, contrary to the FMC, that Section 15 applied to an agreement between members of a multi-employer association as to the financing of an employee benefit program established in a collective bargaining agreement. In *F.M.C.* v. *Pacific Maritime Association*, 435 U.S. 40 (1977), the Supreme Court extended this view, deeming Section 15 applicable to specific terms of a collective bargaining agreement.

> Act as the basis for doing so. The agency has said, however, that specific statutory authority to exempt collective bargaining agreements is preferable.[82]

Initially, the House version of the MLAA afforded relief not only from filing and prior approval requirements, but extended total exemption to discriminatory practices derived from collective bargaining agreements through specific exemptions to Sections 16 and 17 of the Shipping Act. The expressed purpose of the Bill adopted by the House was ". . . to prohibit regulation of collective bargaining agreements by the Federal Maritime Commission. . . ." H.R. Rep. No. 876, 9th Cong., 2d Sess. 1 (1980). The text thereof, drafted as an amendment to Section 15 of the Shipping Act, plainly accomplished this sweeping objective:

> . . . collective bargaining agreements and all provisions thereof, between a common carrier by water, other persons subject to this chapter of a multi-employer bargaining group and a labor organization representing employees in the maritime or stevedoring industry, and any agreements preparatory thereto among members of the multi-employer [69] bargaining group, and any provisions for the implementation of the collective bargaining agreement, including the means and method of raising the money for wages, fringe and other employee benefits provided in the collective bargaining agreements, shall not be deemed either an agreement or a cooperative working arrangement sub-

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[82] *Hearing on H.R. 6613 before the Subcom. on Merchant Marine and Tourism of the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 2d Sess. 1 (June 4, 1980) (opening statement by Sen. Inouye).

> ject to the filing provision herein: *And provided further, that said collective bargainin agreements and agreements preparatory to, and for the implementation thereof, shall not be subject to Commission jurisdiction for any purpose under any other provision of this chapter including, but not limited to, Sections 16, 17 and 22 thereof.*[83] (Emphasis supplied.)

Respondents' position as to MLAA would have been persuasive had this version cleared the legislative process. However, it did not.

After passage in the House by a vote of 358 to 2, the Senate Commerce Committee, upon extensive testimony from persons representing many facets of the shipping industry, adopted a substitute. Insofar as material herein, the Senate version amended Section 15 to except labor agreements from prior approval by the FMC. But, most importantly, no amendments were included affording collective bargaining agreements relief from Sections 16 and 17 of the Shipping Act. The basis for this difference was made apparent by the Senate Report on the substitute:

> On June 4, 1980, the Merchant Subcommittee of the Senate Committee on Commerce, Science and Transportation held hearings on H.R. 6613, at which 11 witnesses, including the FMC, testified. Several of the witnesses representing shippers and significant sectors of the maritime industry, indicated they had not been aware that the House was considering H.R. 6613, and consequently had not been able to express their opposition to the legislation at that time.

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[83] H.R. Rep. No. 876, *supra*, p. 11.

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> The witnesses who appeared at the Committee's June 4 hearing were nearly unanimous in support of exempting collective bargaining agreements from the filing and prior FMC approval requirements of Section 15 of the Shipping Act. The majority of those opposing H.R. 6613 as it passed the House, however, felt the bill went beyond what was necessary to assure free and unfettered collective bargaining, and that it stripped [70] the FMC of jurisdiction to assure equal treatment of shippers, cargo and localities, and to prevent abuses made possible by . . . concerted activity of carriers and others. The Federal Maritime Commission was among the witnesses who testified that the bill went beyond what was necessary. The agency also said it was technically deficient. S. Rep. No. 854, 96th Cong., 2d Sess. 10 (1980).

As was noted, a number of witnesses who testified before the Senate Committee had had no opportunity to testify before House passage of the bill.[84] However, these witnesses voiced strong opposition to the bill on the grounds that the proposed legislation removed too much from FMC jurisdiction. The following statement of the FMC is in consonance with the views presented by those theretofore unheard:

> The Commission had some misgivings about the wisdom of exemptions which extend beyond section 15. . . . The provisions of the Act that would no longer apply were designed to ensure equal treatment of shippers,

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[84] In fact, only one party opposing the bill had an opportunity to testify before the House. See: Testimony of Gerald Ullman, general counsel, National Customs Brokers Forwarders Association of America, Inc., *Hearings, supra*, p. 89.

cargo and localities and to prevent abuse made possible by concerted activity of carriers and others. The question that must be answered before these protections are removed is whether there are other laws which adequately protect these shipping interests absent the Shipping Act. To the extent that other laws protect the interests of shippers, ports and others from unfair treatment, Shipping Act protections could be removed without harm but Congress must ensure such protections exist before pursuing that course.

Whether the antitrust laws would afford sufficient protection to affected parties is a difficult question to answer. Certainly, some protection would be afforded under section 1 of the Sherman Act where the rate, charge or practice was the product of a combination or conspiracy in restraint of trade. However, if an individual carrier chose to implement a provision of a collective bargaining agreement in a discriminatory or unreasonable fashion, it is not at all certain that the antitrust or labor laws would provide a remedy.

[71] There is some possibility that a common law remedy would exist for failure of a common carrier or public terminal operator to live up to its obligations to serve the public equally. However, in order for any common law rights to be resurrected it would take a very strong and clear statement from Congress to overcome the inference that would be generated by partial repeal of the statutory scheme that was enacted to replace those common law rights in the first place. Moreover, resurrection of such common law rights would simply shift the forum from the agency

> charged with expertise in shipping matters to a variety of judicial forums.[15]

The Senate Bill, which was adopted subsequently by both Houses of Congress, specifically affirmed the FMC's jurisdiction under Section 15 with respect to assessment agreements "whether part of a collective bargaining agreement or negotiated separately," but simply replaced the requirement of prior approval with a subsequent condemnation procedure. Insofar as material, the addition to Section 15 provides as follows:

> Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, shall be deemed approved upon filing with the Commission. The Commission shall thereafter, . . . disapprove, cancel, or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States. . . . To the extent that any assessment or charge is found, in such . . . proceeding, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the unjust discrimination or unfairness. . . .

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[15] *Hearing before the Merchant Marine and Tourism Subcom. of the Senate Comm. on Commerce, Science and Transportation, supra,* pp. 17-18.

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With respect to tariffs, the Senate bill failed expressly to exempt labor agreements from Sections 16 and 17 of the Shipping [72] Act. But consistent with the testimony offered to the Senate Commerce Committee and the intention manifested in the Senate Report, the preservation of FMC jurisdiction with respect to unjust discrimination in that area seems evident in the proviso included in a new Section 45 added by the Senate, which recited as follows:

> The provisions of this Act and of the Intercoastal Shipping Act, 1933, shall not apply to maritime labor agreements and all provisions of such agreements except to the extent that such provisions provide for the funding of collecting [sic] bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized. Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this Act or of the Intercoastal Shipping Act, 1933, for any rates, charges, regulations, or practices of a common carrier by water or other person subject to this Act which are *required to be set forth in a tariff*, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement. [Emphasis supplied.]

Contrary to the Respondents, the immediate conflict between the labor and transport policies was in no sense lessened by the MLAA. Nonetheless, I agree with Respondents that to honor the FMC Rulings would be mischievous in the present posture of the case. To view the matter otherwise is to invoke an NLRB remedy with respect to conduct

legitimate under the policy of that Agency, and to justify that result solely by reference to the interpretations of another administrative agency charged with implementing a distinct Congressional concern.

It is true that the National Labor Relations Board has been deemed obligated to give effect to express Congressional mandate. Thus, in *Southern Steamship Co.* v. *Labor Board*, 316 U.S. 314 (1942), the Supreme Court held that the Board erred in ordering reinstatement of seamen discharged for their participation in a mutinous strike which on its face violated Section 292 and 293 of the Federal Criminal Code. The Court in deleting the Board's remedy stated that it "... ignores the plain Congressional mandate that rebellion by seamen against their officers on board a vessel anywhere with[in] the admiralty and maritime jurisdiction of the United States is to be punished as mutiny." [56] The Court also stated, however, that:

> [73] "... Nothing that we have said would prevent the Union from striking, picketing or resorting to any other means of self-help so long as the time and place it chooses do not come within the *express* prohibition of Congress." [57]

Adherence, however, to express statutory constraints on employee conduct is not the equivalent of giving finality to interpretative efforts of other administrative agencies in effectuating different Congressional policy pursuant to different legislative standards. This was made clear in *Local 1976, Carpenters (Sand Door)* v. *N.L.R.B.*, 357 U.S. 93,

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[56] 316 U.S. at p. 43.

[57] 316 U.S. at p. 49.

wherein the Supreme Court, *inter alia,* rejected the Board's view that otherwise lawful hot cargo provisions are to be deemed invalid where executed by common carriers subject to the Interstate Commerce Act. In this respect, the Court reasoned as follows:

> In the recent *Genuine Parts* case, already referred to, *Truck Drivers Union,* 119 N.L.R.B. 399, two members of the Board in fact took this position, stating that when common carriers are involved hot cargo clauses are "invalid at their inception and can be given no operative cognizance so far as the administration of this [the Labor Management Relations] Act is concerned." This is true, it is said, because by entering a contract not to handle the goods the carrier violates its obligations under the Interstate Commerce Act to provide nondiscriminatory service and to observe just and reasonable practices. . . . The Interstate Commerce Commission has in fact ruled that . . . carriers . . . were not relieved from their obligations under the Interstate Commerce Act by a hot cargo clause.
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> It is significant to note the limitations that the Commission was careful to draw about its decision. . . . It was not concerned to determine, as an abstract matter, the legality of hot cargo clauses, but only to enforce whatever duty was imposed on the carriers by the Interstate Commerce Act and their certificates. The Commission recognized that it had no general authority to police such contracts, and its sole concern was to determine whether a hot cargo provision could be a defense to a charge that the carriers had violated some specific statutory duty. It is the Commission that in the first instance must determine whether, because of

certain [74] compelling considerations, a carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it. Other agencies of government, in interpreting and administering the provisions of statutes specifically entrusted to them for enforcement, must be cautious not to complicate the Commission's administration of its own act by assuming as a fixed and universal rule what the Commission itself may prefer to develop in a more cautious and pragmatic manner through case-by-case adjudication.

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The case is not like that in *Southern S.S. Co.* v. *N.L.R.B.*, 316 U.S. 31, where the Board was admonished not to apply the policies of its statute so single-mindedly as to ignore other equally important Congressional objectives. A specific remedy ordered by the Board—reinstatement of employees who had engaged in a strike—worked directly to weaken the effectiveness of a statutory prohibition against mutiny by members of the crew of a vessel. Presumed illegality under the mutiny statute was not used to establish a violation of the labor statutes. It was relied on to establish an abuse of discretion in giving a remedy. Much less was there any suggestion that the Board should abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes.

Sand Door, though by no means indistinguishable is more closely analogous to the immediate issue than *Southern*

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Steamship. But, in any event, other practical considerations warrant a disregard of the FMC rulings herein. Firstly, neither orders of the Board nor those of the FMC are self-enforcing and hence differences as to which policy will prevail will ultimately require judicial endorsement. It would seem, therefore, that the administrative-judicial process is most effectively served by each agency acting on its own in the area of its special expertise.[88]

[75] Furthermore, clear guidelines have not been called to attention of this writer suggesting when and under what circumstances one agency should defer to the determinations of the other. Hence an extension of comity to FMC in this instance would rest on little more than that Agency's having acted first. Such a fortuity seems a dubious predicate ". . . for careful accommodation of one statutory scheme to another . . ." [89] and for Board abdication of ". . . its immediate task" and other important rights conferred by the legislature. Thus, the exemption afforded by Congress to primary activity under the boycott provisions of the Act is no less than an amplification of the rights guaranteed employees through Section 7 ". . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Unquestionably, the FMC, as perhaps was its duty, nullified those rights without airing [sic] in holding that the Rules on Containers are discriminatory and unenforceable simply because they impose conditions, not founded on

[88] The FMC's ruling on the container issue has yet to receive Court approval. Should said ruling be rejected after the Board were to give it binding effect, the instant proceeding would have to be reopened for consideration in that light.

[89] *Southern S.S. Co.* v. *N.L.R.B., supra,* 316 U.S. at p. 47.

transportation factors, which result in a difference in treatment between complying and noncomplying shippers and importers.

It may well be that in the final analysis, the adverse impact on shipping interests brought about by the Rules on Containers will be afforded primacy and deemed a controlling element of analysis of 8(e) and 8(b)(4)(A) and (B) issues. However, there being no cognizable authority as to which policy serves the public interest in more compelling fashion, reconciliation of the conflict would seem beyond the province of the administrative agencies. Hence at this point foundation is lacking for prefer[r]ing the policy aimed at protecting competition in the maritime sector over that designed to mitigate labor-management strife in that and other industries. Accordingly, the FMC ruling is regarded as having no cogent influence upon the assessment of the Union's objective under the secondary boycott provisions of the National Labor Relations Act.

For the above reasons, the contentions of the General Counsel and Charging Parties in this respect are rejected, and it is concluded that to the extent supported by a legitimate work preservation objective, as heretofore found, the Rules are not faulted on the basis of the "Right of Control Doctrine." Instead, it is concluded that the employers signatory to the Rules, by virtue of their control over access to the container technology and the dispersal of jobs inherent therein, possessed the capacity themselves to resolve the underlying dispute.

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H. *The Individual Cases*

1. *American Trucking Association*, 22-CE-44, et al.

On December 6, 1980, an agreement was entered between the ILA, its affiliates and NYSA, CONASA, STA, The

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West Gulf Maritime Association, The Southeast Florida Employers Association, and the Mobile Steamship Association, Inc., whereby the Rules on Containers were again to be subject to enforcement, effective January 1, 1981.[99] In consequence, unfair labor practice charges were filed on December 19, 1980 and on February 18, 1981, the General Counsel issued a first amended consolidated complaint thereon, alleging that said re-entry of the Rules violated 8(e), and that, in connection therewith ILA, on or about December 6, 1980, threatened to induce and encourage individuals employed by NYSA, CONASA, STA, and HRSA to strike, and at that time coerced and restrained certain of said associations to force their entry in said agreement, thereby violating Section 8(b)(4)(i)(ii)(A) of the Act. Said complaint further alleged that the ILA, in furtherance of a primary labor dispute with American Trucking Association, Inc. (ATA), Twin Express, Inc., (Twin) and the International Association of Non-Vessel Operating Common Carriers (IANVOCC), on or about December 6, 1980, threatened to induce and encourage individuals employed by certain of said steamship associations to engage in a strike and coerced and restrained certain of said steamship associations to force them to cease doing business with ATA, Twin, and the IANVOCC in violation of 8(b)(4)(i)(ii)(B) of the Act.

The specific terms of the complaint relate solely to the circumstances surrounding the agreement entered on or about December 6, 1980. There are no allegations placing in issue any aspect of the enforcement of the Rules as contemplated by Respondents during the period following January 1, 1981. As the complaint fails to advert to im-

[99] See Appendix (vii) attached hereto.

proper application or pressures invoked by ILA after December 6, 1980, litigation of that question is beyond the purview thereof and not cognizable in this proceeding.[91]

[77] On the issues framed by the pleadings, there is no evidence that ILA threatened the steamship associations in support of its demand for reimplementation of the Rules nor is there any suggestion that employees were induced to engage in any stoppage in connection with either those negotiations or demands for reapplication of the Rules.

Notwithstanding this failure of proof, it is argued that violations of 8(b)(4)(ii)(A) and (B) are nonetheless maintainable by virtue of the inclusion of penalties in the Rules, in the form of liquidated damages. Unquestionably, liquidated damages are the equivalent of a fine and represent a continuing coercive restraint upon signatory employers to re-enter the Rules through enforcement as against noncomplying third parties. The Board has held that the incorporation of similar forms of economic pressure as a contractual mechanism for enforcement of an unlawful hot cargo agreement will support 8(b)(4)(ii)(A) and (B) violations.[92] Obviously, however, there is no vice in such self help arrangements where designed to enforce negotiated arrangements lawfully preserving work within the primary work unit, for in such a context the objectives proscribed variously in 8(b)(4)(A) and (B) are lacking and no viola-

[91] Thus, affidavits included in Joint Exhibit's No. 1 to the extent that they relate to enforcement of the Rules after January 1, 1981, are of no aid to the inquiry. Though left uncontradicted by Respondents, conduct within this time frame, as indicated, in those affidavits was beyond the allegations in the complaint, Respondents were not placed on notice that said conduct was a matter in issue, and consistent with due process those matters could not be said to have been subject of full litigation herein.

[92] See e.g., *Ets-Hokin Corporation, Etc.*, 154 NLRB 839, 841-843.

tion inures. No more can be found on the instant record. The Rules on Containers are not unlawful on their face, but are "... a facially valid agreement [which] may be invalid for Section 8(e) purposes in particular factual contexts.... In its other applications, the same agreement ... retain[s] its validity." [93] The conclusions herein that the Rules violate 8(e) are predicated upon their specific application to motor carriers and warehousemen, but only insofar as containers are processed by the latter in conjunction with their own traditional work patterns neither created by containerization nor in competition with that performed by deepsea ILA labor in connection with services historically provided by the latter's maritime employers. In all other respects, the Rules have been deemed lawful. Accordingly, as the complaint in *American Trucking Association* neither alleges nor otherwise places in issue any form of proscribed application, no foundation is laid for concluding that the 1980 re-entry violated Section 8(e), or that any pressures applied to signatory employers in quest thereof were for objects condemned by Section 8(b)(4)(A) or 8(b)(4)(B). Accordingly, it shall be recommended that said complaint be dismissed in its entirety.

2. *Consolidated Express, Inc.*, 221 NLRB 956 (1975), enf'd 537 F.2d 706 (C.A. 2, 1976), cert. den. 429 U.S. 104 (1977); *Puerto Rican* [78] *Marine Management, Inc.*, 245 NLRB No. 171 (1979); *Dolphin Forwarding, Inc.*, 236 NLRB 525 (1978), enf'd den. 613 F.2d 890 (C.A.D.C. 1979).

Dismissal of the above cases shall be recommended. All involved NVOCCs or consolidators, against whom, the

[93] *Carrier Air Conditioning Co.* v. *N.L.R.B.*, *supra*, 547 F.2d at p. 1185.

Rules were enforced by either the withholding of containers, or by refusal to load containers aboard ship because stuffed offshore within the Port area in contravention thereof. Having found herein that the Rules apply legitimately to such practices, they were subject to lawful enforcement to preserve the traditional work of deepsea ILA labor, and, accordingly, it shall be recommended that the complaints alleging 8(e) and 8(b)(4)(ii)(B) violations in each of the cited cases be dismissed in their entirety.

3. *Associated Transport, Inc.*, 231 NLRB 351 (1977), enf't den. 613 F.2d 890 (C.A., 1979) remanded 447 U.S. 490 (1980).

The 8(e) and 8(b)(4)(ii)(B) allegation in this case related to enforcement of the Rules against the practice of "shortstopping" FSL containers within the 50 mile port area by motor carriers. Each application of the Rules pertained to container stripping, pursuant to immediate reloading of cargo into over-the-road trailers, consistent with historic motor carrier practice, which was not created by marine technology, nor in competition with Maritime employers. Thus, the offshore work in no way related to work historically performed by deepsea ILA labor at the piers. As heretofore indicated, the application of the 50-mile rule in such a context is not supported by a legitimate work preservation objective and is secondary and violates 8(e). The fines imposed on the steamship company to enforce the Rules in this respect violated 8(b)(4)(ii)(B). Accordingly, it shall be recommended that the order theretofore issued by the Board in his case be reaffirmed, with the modifications recommended herein.

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4. *Hill Creek Farms, Inc.*, Case No. 4-CC-1133, 4-CE-55.

As indicated, this case was pending on exceptions to the Judge's Decision at the time of its consolidation herewith. In that case, the Administrative Law Judge found that locals of the ILA had violated Section 8(b)(4)(i)(ii)(B), and that the 30 day warehouse rule violated 8(e).

The case involved application of the 30-day warehouse clause to a cold storage warehouse, Hill Creek, within the Port of Philadelphia. Briefly stated the facts in that case showed that ILA affiliates received information that Hill Creek was not complying with the 30-day storage requirement, but stripped refrigerated containers of imported meat for immediate loading on trucks. Based thereon, an ILA affiliate [79] interceded to preclude release of such containers to Hill Creek. In finding that the 30-day warehousing clause was violative of Section 8(e) and that the union's conduct violated 8(b)(4)(i)(ii)(B), the Administrative Law Judge relied principally upon the *Conex* rationale and the Board's position therein that the Rules seek to acquire offshore work, rather than to preserve work traditionally performed by the ILA at the pier.

As heretofore indicated at pages 48-52, *supra*, the 30-day warehouse clause, depending on the circumstances, may or may not be supported by a lawful work preservation objective. Thus, it would be lawful as applied to traditional distribution services not created by containerization which did not result in displacement of ILA labor since not in competition with services available through steamship companies or marine terminal operators. On the other hand, as discussed at pages 51-52, *supra*, the *Hill Creek* case presents a fact pattern to which the 30-day rule would legitimately apply as a means of protecting ILA labor against

a new pattern of competition made possible through containerization, which threatened their traditional work practices, by placing pier side cold storage warehouses, which are within the primary unit, at a competitive disadvantage, and thereby eroding work opportunities of deepsea ILA labor. Accordingly, the 8(e) allegations, challenging this application of the 30-day warehousing requirements is viewed as unsubstantiated.[94]

Furthermore, as the withholding of the containers by the ILA represented a refusal to handle cargo pursuant to a business relationship previously entered by signatory steamship companies in violation of their duly negotiated obligation[95] under the 30-day rule, the pressures were of a

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[94] The Administrative Law Judge in finding that the rule embodied a secondary objective, relied on certain extrinsic evidence, including statements imputed to an ILA representative that the action taken against Hill Creek was in the interest of securing work for Portside Refrigeration, a cold storage warehouse within the dock area, which employed ILA labor. In this connection, the Administrative Law Judge concluded that Portside Refrigeration was neither signatory to the Rules nor an employer within the primary work unit. Respondent, in its post-hearing brief, excepted to this latter finding. In an answering brief, dated November 14, 1979, filed with the Board, the General Counsel represented as follows: "Counsel for the General Counsel will stipulate with respect to Respondents' exception 1 and 2, although these facts are not in the record, that Portside Refrigeration is a member of P.M.T.A. and all of Portside's [warehouse] employees are represented by ILA."

[95] The Administrative Law Judge, in finding the violation of Section 8(b)(4)(B), reasoned further that at the time the Hill Creek containers were held on the docks, control had passed to Hill Creek and its motor carrier. From the evidence, however, it does not appear that these containers ever left the dock. In any event, by virtue of the 30-day rule, steamship companies are foreclosed at the outset from releasing containers to warehousemen that fail to abide by the Rules. On evidence that Hill Creek was not

primary nature and not for an objective proscribed by Section 8(b)(4)(i)(ii)(B).

5. *The Terminal Corporation*, 250 NLRB 8 (1980)

[80] This case involved 8(b)(4)(i)(ii)(B) violations arising from container handling operations of the Terminal Corporation, a bona fide warehouse, operating within the port limits of Baltimore, and is illustrative of the diverse conclusions to be reached in assessing applications of the 30-day rule. Thus, Terminal's warehouse facilities in the Port of Baltimore were utilized by a German manufacturer of firebrick. The firebrick was stuffed in Germany in FSL containers and consigned to Terminal. On import, Terminal would strip the container and pursuant to instructions from the exporter, would hold a portion as inventory against future orders, while distributing quantities of brick already sold. Sometimes, the brick would remain in

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complying therewith, ILA members had the right to withhold their labor to enforce the signatory employer's obligation which matured at time when the latter possessed the requisite control. The fact that the ocean bill of lading designated the containers as "House-to-House," is viewed as of no consequence. Prior to acceptance of such an arrangement, the steamship companies are in a position to honor their commitment to the ILA by conditioning access to its vessel and containers upon guarantees that the consignee will not remove cargo from the inland warehouse prior to expiration of the 30-day period. Steamship companies having failed to honor their commitments to the ILA in this respect, are fair game for primary strike action, just as would be the case with respect to an employer, struck in protest of a loss of unit work, which occurs after said employer has contracted out such work in violation of a contractual ban on subcontracting. In either case, self help to enforce otherwise legitimate obligations of the immediate employer do not lose their character as primary activity solely because said employer has removed the work from the primary unit in violation of said obligations.

the warehouse for less, and sometimes longer, than 30 days. The warehouse, in addition to its utility in inventoring against future orders, also made available bricks of various sizes allowing customers to make last minute determinations as to the size needed to meet their requirements.

The Administrative Law Judge found that with respect to such containers, the ILA violated Section 8(b)(4)(i)(ii)(B), by ILA induced temporary refusal of its members to release such containers to Terminal [81] because accompanying shipping papers lacked the 30-day warehousing language as required.

For the reasons stated at pages 50-51, *supra*, the 30-day rule as applied in the above context is unlawful since an intrusion upon traditional inland warehousing practices within the area of cargo storage; i.e., indefinite, deferred, partial distribution, pursuant to a continuing relationship with a consignee or exporter, which is neither in competition with those provided by marine terminal warehouses, nor created by container technology, nor a threat to the work of deepsea ILA labor. In short, the applications of the rule to the FSL import containers in this case involved an attempt by ILA, pursuant to the rules, to compensate for their own job losses, by acquisition of the work historically performed by others.

Additional 8(b)(4)(i)(ii)(B) violations were found by the Administrative Law Judge in connection with Terminal's handling of export containers. In this connection it is noted that prior to containerization, *Terminal* performed no services in connection with export cargo in the port of Baltimore. However, in 1979, Terminal entered into an agreement with a shipper of scrap paper that previously

had utilized its own employees to stuff FSL export containers. Under the arrangement, the shipper would deliver scrap paper to Terminal, and the latter would simply stuff the containers for export. It does not appear that Terminal, in connection therewith, performed any specialized warehousing services. Accordingly, it appears that with respect to these export containers, Terminal acted solely in the capacity of a container handling station within the port area, and in making this service available, engaged in work made economically feasible only through containerization, which tended to undermine conditions under which identical work is performed at the piers by deepsea ILA labor. The fact that these containers previously were stuffed by the shipper's own employees, rather than by deepsea ILA labor, is of no consequence. For, it is one thing, for a shipper to avail itself of the exemption created when it stuffs containers on its own behalf utilizing its own employees, but quite another when it utilizes a port area container handling station to perform that work under conditions which erode the wages, job conditions, and work opportunities to deepsea ILA labor. For the reasons set forth at pages 51-53 herein, I find that the evidence fails to establish that ILA violated Section 8(b)(4)(i)(ii)(B) in this regard.

Accordingly, it is recommended that the Board reaffirm the violations found in *The Terminal corporation* with respect to the stripping of import containers, but dismiss the allegations insofar as they relate to the stuffing of export containers.

6. *Beck Arabia, LTD,* 245 NLRB No. 172.

[82] This case involved the stuffing of FSL containers for export by Shipside Packing Company, a general ware-

house and packing operation located in the port of Baltimore. The shipper involved was Beck Arabia, Ltd, a national of Saudi Arabia, which is engaged in the construction of hotels, apartment buildings, shopping centers, and housing projects in Saudi Arabia. The latter maintains offices in Dallas, Texas, from which it is engaged in the procurement of goods and materials utilized in connection with such foreign construction endeavors. Pursuant thereto, Beck Arabia purchases such items directly from a variety of American manufacturers and suppliers, who, in turn, ship said materials directly to Shipside.

Shipside operates as a holding area for purchases by Beck Arabia. As it receives the purchased goods from various vendors, they are checked and stored, pending instruction from Beck Arabia as to which material is to be shipped on which particular vessel. At that point, Shipside will pick from storage and then consolidate the goods designated for export preparation. Thereafter, the loaded containers are delivered to the piers by independent motor carriers under contract with Shipside.[98]

For the reasons set forth at footnote 58, *supra*, herein, it shall be recommended that the 8(b)(4()(i)(ii)(B) violation in this case be reaffirmed. The instruction by an ILA affiliate, and refusal, by ILA members pursuant thereto, to handle the export containers of Beck Arabia involved an intrusion on traditional services available through inland warehouses, not available at pier side, not created by con-

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[98] Prior to containerization, at least since 1976, Shipside was primarily engaged in the business of building and constructing specialized wooden boxes for export shipment which it loaded for transport to the piers. At that time, Shipside did not engage in the stuffing or stripping of overseas containers.

tainerization, and not historically a part of the ILA's work tradition. The stuffing of the containers in question was but an incident of general storage, picking, and consolidation, pursuant to an ongoing relationship between warehouse and single shipper, which together represent an integrated inland service, distinct from the temporary storage provided at marine terminal warehouses. Accordingly, the Rules on Containers and work preservation attributes thereof, fail to justify the action of the ILA representatives in this case.[97]

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[97] The General Counsel further contends in this case that as the containers, in question, were furnished by a steamship company which was not bound by the Rules, the violations originally found are sustainable on this basis as well. Those containers were owned and provided to Shipside by Gulf Lines, Inc., herein called Gulf. CONASA Exhibit 1 is a letter dated November 7, 1980, over signature of C.P. Lambos, as special counsel to Central Gulf Lines, Inc., which recites, in material part, as follows:

> In the port of Baltimore, Central Gulf uses contract stevedores and is subject to and is bound by the collective-bargaining agreements entered into by and between the Steamship Trade Association of Baltimore, Inc., and the International Longshoremen's Association, AFL-CIO.

This conclusory statement by counsel of record, is self-serving hearsay not otherwise substantiated. Other evidence furnished by the Steamship Association of Baltimore indicates that Gulf is not a direct member of STA. See General Counsel's Exhibit 2(c). One might speculate that Gulf might well be bound to the Rules through the steamship agency which represents Gulf in the Port of Baltimore. However, though evidence of any such arrangement would be available to CONASA, it was not made a part of the record herein. Accordingly, as the record stands, enforcement of any such claim by the longshoremen in this case was not shown to have been invoked with respect to an immediate employer, having power to control assignment of the disputed work, and on that ground as well the 8(b)(4)(i)(ii)(B) violations herein are substantiated.

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[83] 7. *Custom Brokers and Forwarders Association of Miami, Inc.*
Case No. 12-CE-30

This case was pending on exceptions before the Board at the time of consolidation herewith. Involved in that case was an 8(e) allegation based upon the maintenance and enforcement of the Rules in the port of Miami. The Administrative Law Judge dismissed the complaint, finding that in the Port of Miami (1) there was no significant containerization work history prior to 1968, (2) in 1968 the Rules on Containers became effective in that Port, and (3) the Rules have been interpreted and applied since 1968 so that virtually all container work performed since has been performed by ILA labor as required by the Rules. Contrary to *Conex*, he concluded that, in light of the foregoing, the work in dispute could not be defined as "off pier consolidation" but, instead, consisted of the very work defined in the Rules. Accordingly, he viewed the Rules as possessed of a legitimate work preservation objective seeking work which contracting employers held power to assign.

In this particular case, it is observed by the General Counsel and by counsel for the Charging Party that a secondary objective is disclosed herein through the condonation under the Rules of a practice whereby two offshore consolidators, Twin Terminal and Econocaribe were afforded free access to containers, and allowed to strip and stuff same without ILA interference. It appears that Twin Terminal and Econocaribe maintain facilities off pier from which they consolidate freight.

The collective bargaining agreement covered by the rules in the Port of Miami is negotiated between ILA affiliates

and the Southeast [84] Florida Employers' Port Association (SFEPA). Neither Twin Terminal nor Econocaribe were members of SFEPA. Evidence does show that either had ever authorized SFEPA to bargain in their behalf. Nonetheless, customarily, upon completion of SFEPA negotiations, both were approached by representatives of ILA affiliates, and during such encounters, and upon request of the latter, they signed such agreements.

Between 1968 and 1979, while offshore consolidators were denied access to containers, under strict enforcement of the Rules, contrary thereto work was diverted, with assent of the Respondents, for offshore consolidation by Twin Terminal and Econocaribe, as an alternative to the performance of this work at the pier by Deepsea ILA labor.

The Administrative Law Judge concluded that these offshore consolidators were within the primary work unit, and that the rules as applied in the Port of Miami could not be faulted on this ground. In so holding, the Administrative Law Judge noted that neither was a member ". . . of SFEPA and there is no evidence that SFEPA was ever expressly authorized to bargain with ILA . . . on their behalf." Nonetheless, he concluded that because each separately signed the agreements negotiated by SFEPA, participated in the joint trust fund and on the joint grievance committee both "by implication indicated their intention to be bound in collective bargaining by SFEPA rather than bargain on their own behalf." The Administrative Law Judge further concluded that Twin Terminal Services and Econocaribe were part of the multi-employer bargaining unit represented by SFEPA and failed to constitute separate units.

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Such a conclusion is not warranted on this record. Frank Arevalo, the President of Twin Terminal and Jerald Lesnick, the President of Econocaribe, were called by the General Counsel to testify concerning the relationship of said firms to SFEPA. Neither signified that they had designated SFEPA as their representative for purposes of bargaining with the ILA locals in the area, nor did they articulate any other facts indicating commitment that their employees were a part of the port-wide ILA unit. Indeed, the inclusion of these inland operators as within such a broader unit would be inconsistent with traditional Board determinations in the longshore industry, and contrary to the prevailing practice of ILA and the various steamship associations in other ports, both in terms of the nature of the employers belonging to or represented by such steamship associations as well as the composition of the employee unit on whose behalf such port-wide bargaining generally takes place. In the total circumstances, the fact that these offshore operators signed and honored the ILA contracts does not neutralize the clear inference that Twin Terminal and Econocaribe were not a part of the unit covered by the Rules. Instead, it is concluded that both offshore firms simply signed [85] separate agreements founded upon that negotiated by SFEPA and those separately executed documents simply covered separate appropriate units limited to their respective employees. "... [T]he Board has found that an employer does not become a part of a multi-employer bargaining group ... where it merely adopts a collective-bargaining agreement in the negotiation of which it did not actually participate and which it did not authorize another to negotiate on its behalf."[88]

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[88] *Ruan Transport Corporation*, 234 NLRB 241, 242.

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As neither Twin Terminal or Econocaribe consented to be a part of the multi-employer unit, the disparate treatment of these two consolidators in relation to those that did not employ ILA labor, was beyond sanction of the Rules, and in furtherance of an unlawful organizational objective designed to force offshore consolidators to employ ILA members.[99] Thus, this conduct was in consonance with the principle that ". . . where an object . . . is to aid union members generally, rather than members of a unit, the object is secondary and unlawful."[100] In this instance, restricted access to container technology was not pertinent to any dispute between ILA affiliates and members of SFEPA, but invoked in quest of organization of other employers, whose employees were not represented by ILA. Said arrangement is found to have violated Section 8(e) of the Act.

IV. Conclusions of Law

A. *American Trucking Association* 22-CE-19, et al.

1. The various employers and persons, including the Charging Parties and Respondent Steamship Associations, named in Section I, pages 4-5 of this decision, are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and "persons" engaged in an industry affecting commerce within the meaning of Section 8(b)(4)(i) and (ii) of the Act.

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[99] *National Maritime Union of America, AFL-CIO (Commerce Tankers Corporation)*, 196 NLRB 1100.

[100] See *Meat and Highway Drivers, Local 710, Teamsters (Wilson & Co.)* v. *N.L.R.B.*, 335 F.2d 709, 716.

2. Respondent ILA and its affiliates named in Section II, pages 7, of this decision are labor organizations within the meaning of Section 2(5) of the Act.

[86] 3. Respondent Unions and Steamship Associations did not violate Section 8(e) of the Act by, on December 6, 1980 agreeing, to reimplement the Rules on Containers, effective January 1, 1981, and Respondent Unions did not violate Section 8(b)(4)(i)(ii)(A) or (B) in connection with its efforts to secure said agreement.

B. *Consolidated Express, Inc.*
221 NLRB 956

1. New York Shipping Association, Inc., Consolidated Express, Inc., and Twin Express, Inc., are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Longshoremen's Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Union did not engage in violations of Section 8(b)(4)(ii)(B) as alleged herein.

4. Respondent Union and New York Shipping Association, Inc., did not engage in violations of Section 8(e) of that Act, as alleged in the consolidated complaints herein.

C. *Dolphin Forwarding, Inc.*
236 NLRB 525

1. New York Shipping Association, Inc.; Dolphin Forwarding, Inc., and San Juan Freight Forwarders, Inc., are

employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Longshoremen's Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents ILA and NYSA did not violate Section 8(e) of the Act by maintaining, giving effect to or enforcing the Rules on Containers.

4. Respondent ILA did not violate Section 8(b)(4)(ii)(B), by efforts to enforce the Rules on Containers as alleged herein.

D. *Puerto Rico Marine Management, Inc.*
245 NLRB No. 171

1. Puerto Rico Marine Management, Inc., Jacksonville Maritime Association, Inc., Caldwell Shipping Company, and International Container Express, are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

[87] 2. International Longshoremen's Association, AFL-CIO, Local Union No. 1408, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent ILA Local 1408 did not enforce the Rules on Containers through means proscribed by 8(b)(4)(ii), or for an object proscribed by Section 8(b)(4)(ii)(B) of the Act.

E. *Associated Transport, Inc.*
231 NLRB 351

1. Houff Transfer, Inc.; Associated Transport, Inc.; Steamship Trade Association of Baltimore, CONASA,

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Hampton Roads Shipping Association, Tidewater Motor Truck Association, U.S. Lines, and Lavino are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. ILA, Hampton Roads District Council, Atlantic Coast District Council and Locals 333, 846, 862, 921, 957, 970, 1248, 1355, 1429, 1458, 1624, 1736, 1783, 1784, 1819, 1840 and 1970 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent labor organizations and Respondents CONASA and HRSA violated Section 8(e) by enforcing the CONASA-ILA Rules on Containers under conditions precluding Associated Transport, Inc.; Houff Transfer, Inc.; Pilot Freight Carriers, Inc.; and Thurston Motor Lines, Inc., from performing work they traditionally performed as motor carriers which was not created by containerization, was not in competition with services provided by members of CONASA and HRSA, and was not traditional work performed by deepsea ILA labor at the piers.

4. Respondent labor organizations violated Section 8(b)(4)(ii)(B) of the Act by seeking to or imposing fines against employer-members of HRSA, including U.S. Lines, and other persons for an object, to the extent found unlawful herein, of forcing said persons to cease doing business with Associated Transport, Inc., Houff Transfer, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., and members of the Tidewater Motor Truck Association.

5. The unfair labor practices found herein have an affect upon commerce within the meaning of Section 2(6) and (7) of the Act.

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F. *Hill Creek Farms, Inc.*
Case No. 4-CC-133, et al.

1. Hill Creek Farms, B. Barks and Sons, Inc., C.F. Anderson Company, World Wide Trading Company, Delaware Operating Company and employer-members of the Philadelphia Maritime Association are employers [88] and/or persons engaged in commerce within the meaning of Section 2(6) and (7) and Section 8(b)(4) of the Act.

2. ILA Local 1242 is a labor organization within the meaning of Section 2(5) of the Act.

3. ILA Local 1242 and PMTA have not violated 8(e) by entering into an agreement whereby employer-members of PMTA ceased doing business with Barks, Hill Creek or any other person.

4. ILA Local 1242 has not violated Section 8(b)(4)(i)(ii)(B), in connection with its conduct, forcing or requiring employer-members of PMTA to cease doing business with Hill Creek, Barks and other persons.

G. *Beck Arabia, LTD.*
245 NLRB No. 172

1. Beck Arabia, Ltd., Chesapeake Operating Company, Central Gulf Lines, Inc., and Shipside Packing Company, Inc., and each of them, is an employer engaged in commerce, and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents, and each of them, and Local 311, are labor organizations within the meaning of Section 2(5) of the Act.

3. By instructing ILA members employed by Chesapeake not to handle goods packed by Shipside, and by coercing and restraining Chesapeake, Gulf, Beck Arabia, and other persons engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring such persons to cease doing business with Shipside in connection with Shipside's performance of work not claimable by ILA, Respondents engaged in unfair labor practices in violation of Sections 8(b)(4)(i) and (ii)(B) of the Act.

4. The unfair labor practices found herein have an affect upon Commerce within the meaning of Section 2(6) and (7) of the Act.

H. *The Terminal Corporation*
250 NLRB 8

1. The Terminal Corporation, Chesapeake Operating Company, and Ceres Terminals, Inc., and each of them, are employers engaged in commerce and in operations affecting commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

[89] 2. International Longshoremen's Association, AFL-CIO, International Longshoremen's Association, Atlantic Coast District, AFL-CIO, International Longshoremen's Association, Local 333, AFL-CIO, International Longshoremen's Association, Local 953, AFL-CIO, collectively referred to here as the Respondents, and each of them, are labor organizations within the meaning of Section 2(5) of the Act.

3. By inducing and encouraging employees of Chesapeake and Ceres, members of Respondents, not to handle goods consigned to Terminal for performance of work not

subject to legitimate claim under the rules on containers, and by coercing and restraining Chesapeake and Ceres, with an object of forcing or requiring Chesapeake, with respect to such work, to cease doing business with Terminal, Respondents engaged in unfair labor practices affecting commerce in violation of Section 8(b)(4)(i)(ii)(B) of the Act.

4. Respondents did not violate Section 8(b)(4)(i)(ii)(B) by inducing and encouraging employees of Chesapeake and Ceres not to handle goods stuffed by Terminal, which is worked lawfully assigned to deepsea ILA labor under the Rules on Containers, even though, an object of such pressures was to force Chesapeake and Ceres to cease doing business with Terminal.

5. The unfair labor practices found herein have an affect upon commerce within the meaning of Section 2(6) and (7) of the Act.

I. *Custom Brokers and Forwarders Association of Miami, Inc.*
Case No. 12-CE-30

1. Custom Brokers and Forwarders Association of Miami, Inc. and Southeast Florida Employers Port Association are employers within the meaning of Section 2(6) and (7) of the Act.

2. ILA Locals 1406; 1406-A; 1680; 1526; 1526-A; and 1922, AFL-CIO, are labor organizations within the meaning of Section 2(6) and (7) of the Act.

3. Respondent Unions and Respondent SFEPA violated Section 8(e) of the Act insofar as they have enforced an

agreement or arrangement as an organization device, whereby Respondent SFEPA have refused to do business with employers not employing ILA labor but has continued to do business with employers, not within the primary work unit, but who employ ILA labor.

[90] 4. The unfair labor practices found herein have an affect upon commerce within the meaning of Section 2(6) and (7) of the Act.

V. The Remedy

Having found that violations were not substantiated in *American Trucking Association, supra; Consolidated Express, Inc., supra; Dolphin Forwarding, Inc., supra; Puerto Rico Marine Management, Inc., supra,* and *Hill Creek Farms, Inc., supra;* it shall be recommended that the complaints therein be dismissed in their entirety.

In the remaining cases, violations have been reaffirmed in *Associated Transport, Inc., supra; Beck Arabia, Ltd., supra,* and the *Terminal Corp., supra.* However, the original remedies issued in those cases were founded upon the Board's theory that the Rules on Containers were unlawful on their face as universally embodying a proscribed work acquisition objective. Having found herein that the Rules are not *per se* unlawful, but that, in particular circumstances, they have been unlawfully applied, it shall be recommended that these pending orders be modified so as to preserve the legitimate aspects of the Rules.

As indicated, the final case, *Custom Brokers and Forwarders Association of Miami, Inc., supra,* was dismissed by the Administrative Law Judge. However, having found herein that Respondents in that case gave effect to an

arrangement in violation of 8(e) whereby a preference was accorded to off pier operators employing ILA members over those that did not, it shall be recommended that Respondents therein cease and desist from entering, maintaining or enforcing any such arrangement as an aid to Respondent Unions' organizational objectives. However, for remedial purposes, it is noted that this unlawful practice with respect to container distribution is one not countenanced either by the literal terms of the Rules on Containers or the negotiating history which led to their adoption in the Port of Miami. Hence, the remedy recommended herein is addressed to the illicit practice only, without disturbing the job security interests otherwise rightfully conferred, by virtue of the Rules, upon deepsea ILA labor in that Port.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record in this consolidated proceeding and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[101]

[91]

VI. Revised Supplemental Order

Associated Transport, Inc.

Cases 5-CC-791, 5-CE-48, et al.

A. Respondents International Longshoremen's Association, AFL-CIO, Hampton Roads District Council, International Longshoremen's Association, AFL-CIO, Atlantic

[101] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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Coast District Council, International Longshoremen's Association, AFL-CIO, ILA Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1429, 1458, 1624, 1736, 1783, 1784, 1819, 1840 and 1970, AFL-CIO, their officers, agents, and successors shall:

1. Cease and desist from:

(a) Giving effect to and enforcing the contracts and agreements known as the CONASA-ILA rules on containers to the extent and in the manner said applications have been found to be unlawful herein.

(b) Continuing to seek or impose fines against employer-members of HRSA, including U.S. Lines, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with Associated Transport, Inc., Houff Transfer Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., or any other employer-members of Tidewater Motor Truck Association, provided that, the terms hereof, shall only apply with respect to the practice of said motor carriers whereby import containers are stripped for their exclusive benefit, as an incident of traditional motor carrier practice, neither created by containerization, nor rivaled by services provided by marine operators or at the pier by deepsea ILA labor.

(c) Coercing or restraining CONASA, HRSA, or any of HRSA's employer-members, or any other person engaged in commerce in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with Associated Transport, Inc., Houff Transfer, Inc., Pilot Freight Carriers, Inc., Thurs-

ton Motor Lines, Inc., or any other employer-members of Tidewater Motor Truck Association, provided that, the terms hereof, shall only apply with respect to the practice of said motor carriers whereby import containers are stripped for their exclusive benefit as an incident of traditional motor carrier practice, neither created by containerization nor rivaled by services traditionally rendered by marine operators and performed at the pier by deepsea ILA labor.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act.

[92] (a) Notify all of their members who are employed by employer-members of HRSA that the CONASA-ILA rules on containers which have been negotiated between ILA and CONASA on behalf of HRSA may not be enforced to restrain, restrict, limit, fine, or prohibit handling containers with respect to Associated Transport, Inc., Houff Transfer, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., or any other employer-member of Tidewater Motor Truck Association, to the extent that those containers are stripped as an incident of traditional motor carrier practice, for the exclusive benefit of motor carriers, pursuant to their traditional practice, not rivaled by services traditionally rendered by motor operators and performed at the piers by deepsea ILA labor.

(b) Post at all of their respective business offices, meeting halls, and dispatch halls copies of the attached notice marked "Appendix B".[102] Copies of said notice, on forms

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[102] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL

provided by the Regional Director for Region 5, after being duly signed by a representative of each Respondent labor organization named in this section of the Order, shall be posted by each of the said labor organizations immediately upon receipt thereof, and be maintained by each of them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by said labor organizations to insure that these notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps each of said labor organization has taken to comply herewith.

B. Respondents Council of North Atlantic Shipping Associations, (CONASA), and Hampton Roads Shipping Association (HRSA), their respective officers, agents, successors, and assigns, shall:

1. Cease and desist from giving effect to, and enforcing the contracts and agreements known as the CONASA-ILA rules on containers to the extent and in the manner said application has been found to be unlawful herein.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

[93] (a) HRSA shall notify U.S. Lines and all other employer-members of HRSA that the CONASA-ILA rules

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LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

and container[sic]s, which have been negotiated between ILA and CONASA on behalf of HRSA may not be enforced to restrain, restrict, limit, or prohibit handling containers with respect to Associated Transport, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., or any other employer-member of Tidewater Motor Truck Association, to the extent that said containers are stripped, for the exclusive benefit of motor carriers, pursuant to their traditional practice, not rivaled by services traditionally rendered by marine operators and performed by deepsea ILA labor.

(b) CONASA shall notify U.S. Lines and all other members of HRSA that the CONASA-ILA rules on containe[sic]:s which have been negotiated between ILA and CONASA on behalf of HRSA may not be enforced to restrain, restrict, limit, or prohibit handling in the customary manner, containers with respect to Associated Transport, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., or other employer-member of Tidewater Motor Truck Association, to the extent that said containers are stripped, for the exclusive benefit of motor carriers, pursuant to their traditional practice, not rivaled by services traditionally rendered by marine operators and performed by deepsea ILA labor.

(c) HRSA shall mail to U.S. Lines and each of HRSA's other employer-members, and post at its Norfolk, Virginia, office copies of the attached notice marked "Appendix C." [103] Copies of said notice, on forms provided by the

[103] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSU-

Regional Director for Region 5, after being duly signed by the Respondent HRSA's representative, shall be posted by it immedatiely upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employer-members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) CONASA shall mail to HRSA, U.S. Lines, and each of the other employer-members of HRSA, and post at CONASA's main office in New York, New York, copies of the attached notice marked "Appendix D".[104] Copies of [94] said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent CONASA's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to member associations are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, with 20 days from the date of this Order, what steps Re-

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ANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[104] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

spondents CONASA and HRSA have taken to comply herewith.

Beck Arabia, Ltd.

Respondent International Longshoremen's Association, AFL-CIO, International Longshoremen's District Council, Baltimore, Maryland, International Longshoremen's Association, Local 953, and International Longshoremen's Association, Local 333, their officers, agents and representatives, shall:

1. Cease and desist from inducing or encouraging individuals employed by Chesapeake Operating Company or by other persons engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threatening, coercing, or restraining Chesapeake Operating Company, Central Gulf, Beck Arabia, or any other persons engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is to require the above-named persons, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with Shipside Packing Company, Inc., or any other person, but only to the extent that said persons are not engaged in work lawfully claimable by Respondents as set forth in the attached Decision of the Administrative Law Judge.

2. Take the following affirmative action which will effectuate the policies of the Act;

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(a) Notify members of International Longshoremen's Association, Locals 333 and 953, that Respondents have no objection to loading of containers that have been stuffed by Shipside Packing Company, Inc., to the extent that said container handling is performed in conjunction with traditional general warehousing practices of marshalling, storing, picking and packing on a continuing basis for a single shipper, of inland accumulations of cargo for export.

[95] (b) Notify members of International Longshoremen's Association, Locals 333 and 953, that any previous instructions, requests, or appeals which Respondents have made against loading or unloading cargo for or from Shipside Packing Company, Inc., have been withdrawn, to the extent that they apply to the handling of containers for such purposes.

(c) Post in conspicuous places in the Respondents' business offices and meeting halls copies of the attached notice marked "Appendix E".[105] Copies of said notice, on forms provided by the Regional Director for Region 5, shall after being duly signed by the Respondents' representative, be posted by the Respondents immediately upon receipt thereof, and maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to insure that the

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[105] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

said notices are not altered, defaced, or covered by any other material.

(d) Mail to the Regional Director for Region 5 sufficient signed copies of the aforementioned notice for posting by Chesapeake and Shipside, those companies willing, at all places where notices to their respective employees are customarily posted.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

The Terminal Corporation

The Respondents, International Longshoremen's Association, AFL-CIO, International Longshoremen's Association, Atlantic Coast District, AFL-CIO, International Longshoremen's Association, Local 333, AFL-CIO, International Longshoremen's Association, Local 953, AFL-CIO, individually and collectively, their officers, agents, and representatives, shall:

1. Cease and desist from inducing or encouraging individuals employed by Chesapeake Operating Company, Ceres Terminals, Inc., or any other persons engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or [96] threatening, coercing, or restraining Chesapeake Operating Company, Ceres Terminals, Inc., or any other persons engaged in commerce or in an industry affecting commerce, where an

object thereof is to require the above-named persons, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with the Terminal Corporation, or any other person, to the extent found unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Notify members of International Longshoremen's Association, AFL-CIO, International Longshoremen's Association, Atlantic Coast District, AFL-CIO, International Longshoremen's Association, Local 333, AFL-CIO, International Longshoremen's Association, Local 953, AFL-CIO, that the Respondents have no objection to the stripping of cargo from containers by The Terminal Corporation, insofar as such container handling is in conjunction with traditional general warehousing functions of indefinite storage *and* deferred, partial distribution, performed pursuant to a continuing relationship with an exporter or consignee.

(b) Notify members of International Longshoremen's Association, AFL-CIO, International Longshoremen's Association, Atlantic Coast District, AFL-CIO, International Longshoremen's Association, Local 333, AFL-CIO, International Longshoremen's Association, Local 953, AFL-CIO, that any previous instructions, orders requests, or appeals which the Respondents have made against unloading or releasing containers for or to The Terminal Corporation have been withdrawn, to the extent that such containers are to be stripped in conjunction with traditional general

warehousing functions of indefinite storage, *and* deferred, partial distribution pursuant to a continuing relationship with an exporter or consignee.

(c) Post at conspicuous places in the Respondents' business offices and meeting halls copies of the attached notice marked "Appendix F".[106] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by the Respondents' representatives, shall be posted by the Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous [97] places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(d) Mail to the Regional Director for Region 5 sufficient signed copies of the aforementioned notice for posting by Chesapeake, Ceres, and Terminal, those companies willing, at all places where notices to their respective employees are customarily posted.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

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[106] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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Custom Brokers and Forwarders Association of Miami, Inc.

A. Respondents International Longshoremen's Association, Locals 1416; 1416-A; 1680; 1526; 1526-A and 1922, AFL-CIO, Miami, Florida, individually and collectively, their officers agents and representatives, shall:

1. Cease and desist from giving effect to any agreement, arrangement or plan, express or implied whereby members of Southeast Florida Port Association are to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with members of Custom Brokers and Forwarders Association of Miami, Inc., or any other person, to the extent that such an agreement, arrangement or plan is invoked as an aid to organizing employees and encouraging their membership in the International Longshoremen's Association, or its affiliates.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act herein:

(a) Notify all members who are employed by employer-members of Southeast Florida Employers Port Association that they wil[l] not seek to participate in, or in any manner enforce any arrangement whereby access to maritime containers will be afforded to or denied to members of Custom Brokers and Forwarders Association of Miami, Inc. or any other person engaged in work off the piers, on the basis of whether they do or do not employee[no e-]members of the International Longshoremen's Association or its affiliates.

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[98] (b) Post at their offices and meeting halls copies of the attached notice marked "Appendix G".[107] Copies of said notice to be provided by the Regional Director for Region 12 after being signed by an authorized representative of the Respondent Unions shall be posted immediately upon receipt thereof and be maintained by them for a period of 60 days thereafter in conspicuous places including all places where notices to its members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(c) Sign and mail sufficient copies of said notices to the Regional Director for Region 12 for posting by Custom Brokers and Forwarders Association of Miami, Inc., if they be willing, at all places where notices to their members or employees are customarily posted.

(d) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order what steps Respondent has taken to comply herewith.

B. Respondent Southeast Florida Employers Port Association, Coordinated Caribean Transport, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company, and Marine Terminals, Inc., Miami, Florida, their officers, agents, successors and assigns, shall:

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[107] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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1. Cease and desist from giving effect to any agreement, arrangement or plan, express or implied, whereby employer-members of Southeast Florida Employers Port Association are to cease handling, transporting, or otherwise dealing in the products of any other processor, or to cease doing business with members of Custom Brokers and Forwarders Association of Miami, Inc., or any other person, to the extent that such an agreement, arrangement or plan is invoked as an aid to organizing employees and encouraging their membership in the International Longshoremen's Association, or its affiliates.

2. Take the following affirmative action which is deemed necessary to effectuate the purposes and policies of the Act:

(a) Notify all their members and employees that they will not participate in or enforce any arrangement, agreement or plan, express [99] or implied, whereby access to maritime containers is afforded or denied to members of Custom Brokers and Forwarders Association of Miami, Inc., or any other person engaged in work off the piers, on the basis of whether they do or do not employee members of the International Longshoremen's Association or its affiliates.

(b) Post in their offices in the Port of Miami, Florida, copies of the attached notice marked "Appendix H".[100]

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[100] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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Immediately upon receipt of said notices, on forms to be provided by the Regional Director for Region 12, the Respondents shall cause the copies to be signed by one of their authorized representatives and posted, the posted copies to be maintained for a period of sixty consecutive days thereafter in conspicuous places, including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 12, in writing, within twenty days from the date of this Order, what steps the Respondents have taken to comply herewith.

IT IS HEREBY FURTHER ORDERED that the complaint consolidated herewith in *Dolphin Forwarding, Inc.*, Cases 2-CC-1364, 2-CC-1365, 2-CE-75; *Hill Creek Farms, Inc.*, Cases 4-CC-1133 and 4-CE-55; *Puerto Rico Marine Management, Inc.*, Cases 12-CC-1002 and 12-CC-1004; *Consolidated Express, Inc.*, 22-CC-541, 22-CC-554, 22-CE-19, 22-CE-20; and *American Trucking Association, Inc.*, Cases 22-CC-806, 22-CC-807, 22-CC-808, 22-CC-809, 22-CC-810, 22-CE-44, 22-CE-45, 22-CE-46, 22-CE-47 and 22-CE-48, be, and they hereby are, dismissed in their entirety.

Dated, Washington, D.C. September 29, 1981

/s/ JOEL A. HARMATZ
Joel A. Harmatz
Administrative Law Judge

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[i]

APPENDIX A(i)

NYSA—ILA SETTLEMENT TERMS—1959

8. *Containers:—Dravo Size or Larger*

(a) Any employer shall have the right to use any and all type of containers without restriction or stripping by the union.

(b) The parties shall negotiate for two weeks after the ratification of this agreement, and if no agreement is reached, shall submit to arbitration in the manner described in paragraph 13 below, the question of what should be paid on containers which are loaded or unloaded away from the pier by non-ILA labor, such submission to be within 30 days thereafter.

(c) Any work performed in connection with the loading and discharging of containers for employer-members of the NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

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[ii]

APPENDIX A(ii)

NYSA—ILA SETTLEMENT TERMS—1969

Containerization—a new Clause which in the case of the Port of New York shall be the addition of a new sub-paragraph to Clause XII, Paragraph 2.

(c) Containers owned or leased by employer-members (including containers on wheels) containing LTL loads or consolidated full-container loads, which are destined for or come from, any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo, and which either comes from or is destined to any point within a 50 mile radius from the center of any North Atlantic District port shall be stuffed and stripped by ILA labor at longshore rates on a waterfront facility under the terms and conditions of the General Cargo Agreement. (Rules on Containers are attached.)

RULES ON CONTAINERS

The following provisions are intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts at deepsea piers or terminals. To assure compliance with the collective bargaining provisions the following rules and regulations shall be applied:

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Rule 1. Definitions and Rule as to Containers Covered

Stuffing—means the act of placing cargo into a container.

Stripping—means the act of removing cargo from a container.

Loading—means the act of placing containers aboard a vessel.

Discharging—means the act of removing containers from a vessel.

These provisions relate solely to containers meeting each and all of the following criteria:

(a) Containers owned or leased by employer-members (including containers on wheels) which contain LTL loads or consolidated full container loads.

(b) Such containers which come from or go to any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.

[iii]

(c) Such containers which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

Rule 2. Rule of Stripping and Stuffing Applied to Such Containers

A container which comes within each and all of the criteria set forth in Rule 1 above shall be stuffed and stripped by ILA longshore labor. Such ILA labor shall be paid and employed at longshore rates under the terms and conditions of the General Cargo Agreement. Such stuffing and stripping shall be performed on a waterfront facility, pier or dock. No container of cargo shall be stuffed or stripped by ILA longshore labor more than once. Nothwithstanding the above provisions, LTL loads or consolidated container loads of mail, or household goods with no other type of cargo in the container, and of personal effects of military type of cargo in the container, and of personal effects of military personnel shall be exempt from the rule of stripping and stuffing.

Rule 3. Rules on No Avoidance or Evasion

The above rules are intended to be fairly and reasonably applied by the parties. To obtain nondiscriminatory and fair implementation of the above, the following principles shall apply:

(a) Agreement in the Port as to the geographic area as provided in Rule 1-(c) is based on present LTL movement patterns in the port. Should any person, firm or corporation, for the purpose of evading the provisions of Rule 2 hereof, seek to change such pattern by shifting its operations to, or commencing new operations at, a point outside said agreed-upon geographic area, then either party may raise the question whether said point should be included with-

in the said geographic area, and upon agreement that the purpose of the shift in its operations was to evade the provisions of Rule 2, then said point shall be deemed to be within the said geographic area for the purpose of these rules.

(b) Containers owned or leased by companies which are affiliated either directly or through a holding company with an employee-members shall be deemed to be containers owned or leased by employer-members. Affiliation shall include subsidiaries and/or affiliates which are effectively controlled by the employer-member, its parent, or stockholders of either of them.

(c) It shall be the obligation of employer-members to clearly mark each container's documentation as to whether or not it is a Rule 1 container which is to be stuffed and stripped at the waterfront facility (pier or dock).

[iv]

(d) Each employer-member shall keep records of each container supplied to a consolidator or other non-owner of cargo, located within the agreed geographic area, and such record shall be available to the Committee provided in (g) below. With respect to all containers received at or delivered from the waterfront facility (pier or dock), a record of the same shall be made by ILA Checkers or Clerks.

(e) Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the

provisions of Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been stuffed or stripped under the rules then the steamship carrier shall pay to the joint Welfare Fund liquidated damages of $250 per container which should have been stuffed or stripped.

(f) If any shippers or their agents who have at any time used, are now using, or in the future use containers owned or leased by employer-member, hereafter use containers not owned or leased by employer-members, for the purpose of evading the provisions of Rule 2 hereof, then the containers so used shall be considered to be within Rule 1 and Rule 2.

(g) A committee represented equally by management and union shall be formed and shall have the responsibility and power to hear and pass judgment on any violations of these rules. Any inability to agree shall be processed as a grievance under the applicable contract except as limited by 3(h) hereof.

(h) If the purposes of protecting and preserving the present work jurisdiction of longshoremen and all other deepsea ILA crafts over any containers loaded with LTL cargo, or consolidated full container loads as defined herein is not accomplished by the provisions of these rules on containers, then either party shall have the right to renegotiate these provisions or any part thereof by giving notice to the other party. This provision shall not be subject to

arbitration. Pending renegotiation and settlement of the given dispute, the employees may decline to work any containers involved in the dispute and such refusal to work shall not be subject to arbitration. The renegotiation referred to above will not be subject to arbitration. Interpretation of this provision shall not be determined by an arbitrator but by a court of competent jurisdiction.

Container Royalty

The rate of contributions now in effect shall continue.

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[v] APPENDIX A(iii)

CONASA-ILA MEMORANDUM OF AGREEMENT—1972

The following is agreed to by CONASA and ILA in final and complete settlement of the seven (7) Master Contract issues, subject to such regulatory approvals as may be necessary:

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6. CONTAINERIZATION

Container Royalty—An additional container royalty equal to the present container royalty of 35c, 70c and $1.00 per gross ton payable as provided in the November 16, 1960 Stein Award to be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port by port basis.

RULES ON CONTAINERS

Rule 1. Definitions and Rule as to Containers Covered.

• • • • •

(b) Such containers which come from or go to any person (including [but not limited to] a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.

• • • • •

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Rule 3. Rules on No Avoidance or Evasion

• • • • •

(c) It shall be the obligation of employer-members to clearly mark each container's documentation as to whether or not it is a Rule 1 container which is to be stuffed and stripped at the waterfront facility (pier or dock). [If a container is not clearly marked it shall be deemed a Rule 1 container, and it shall be stuffed or stripped.]

• • • • •

(e) Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront [vi] facility at which it should have been stuffed or stripped under the rules, then the steamship carrier shall pay, to the joint [Container Royalty Fund,] liquidated damages of [$1,000 per container which should have been stuffed or stripped. [Such damages shall be used for the same purposes as the first Container Royalty is used in each port. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in (g) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.

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[vii] APPENDIX A(iv)

CONASA-ILA CONTAINER COMMITTEE

INTERPRETATIVE BULLETIN No. 1

In accordance with the resolution made at the January 29, 1973, meeting of the CONASA-ILA Container Committee, directing that all interpretations be issued by the CONASA-ILA Container Committee office and promulgated to all local Port Container Committees as well as all other interested parties, Interpretive Bulletins will be issued periodically by the CONASA-ILA Container Committee for the information of all interested parties.

This document is the first such Interpretive Bulletin and sets forth the determinations reached by the CONASA-ILA Container Committee at its meetings of September 11-13, 1972, and at its meetings of January 25-29, 1973.

No person or representaive is authorized to issue any interpretations other than the Port Container Committees in each CONASA port subject to review by the full CONASA-ILA Container Committee in cases of conflict. The CONASA-ILA Container Committee will issue further clarifications and interpretations only at the request of members of one of the CONASA Port Associations or an official of an ILA Local Union. Interpretations and clarifications will not be issued to any party not covered by the various Collective Bargaining Agreements. Requests, in writing, for clarifications and interpretations should be addressed to the CONASA-ILA Container Committee at the above address.

The CONASA-ILA Container Committee has issued the following interpretations and definitions as of the date of this Bulletin:

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INTERPRETATION 1.1

Containers Covered

The rules on containers relate solely to containers meeting either of the following criteria:
[viii]

(a) Containers owned or leased by carriers (including containers on wheels) which contain LTL loads or consolidated full container loads, which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

(b) Containers which come from or go to any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not a beneficial owner of the cargo and such containers come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

INTERPRETATION 1.2

Batching

When an employer member or carrier uses a trucker to remove or deliver containers in batches, or in substantial

number, from or to a terminal to another place of rest (outside of its terminal) where containers are stored pending their delivery to consignee (or after being received from a shipper and while awaiting the arrival of a ship), for the purpose of reducing the work jurisdiction of the ILA or any of its crafts (and when adequate physical space exists on the facility for storage of such containers), such use is deemed to be batching and is a violation of the CONASA-ILA contract.

INTERPRETATION 1.3

Warehousing

A beneficial owner does not violate the Rules on Containers when he warehouses his goods in bona fide public warehouse under the following conditions:

1. The container cargo is warehoused at a bona fide public warehouse.

2. The beneficial owner pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days; and

3. The cargo is being warehoused (a) in the normal course of the business of the beneficial owner; (b) title to such goods has not been transferred from the beneficial owner to another; and (c) it is contemplated that such transfer of title will not take place for at least 30 days after the warehousing of the cargo. This exception shall not apply where cargo is warehoused for the purpose of avoidance or evasion of Rule 1.

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[ix]

4. The beneficial owner furnishes all documentation and other information which permits the Container Committee in the port to determine whether conditions 1, 2 and 3 have been met.

5. This definition is limited to containers warehoused as provided in the above conditions and any warehouse which does not conform to such conditions shall be deemed a distribution station and treated accordingly.

INTERPRETATION 1.4

Beneficial Owner

The beneficial owner is the ultimate owner entitled to the beneficial use, enjoyment and title of the property. The term ultimate owner refers to one using the cargo in the normal course of his business but it does not include a broker, distributor, consolidator, trucker, forwarder, warehouseman or the ultimate consumer.

INTERPRETATION 1.5

Headload

Where a single beneficial owner sends a container (either export or import) which contains all of his own cargo to a carrier's pier and such container is not full, the carrier may chock this container with additional cargo and at arrival at another port the carrier may strip the additional cargo and send the remaining cargo to the beneficial owner. The chocking or stripping at ILA ports shall be performed at a pier by deep[-]sea [sic] ILA labor.

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INTERPRETATION 1.6

Enforcement of Rules on Containers

The following standards are hereby promulgated to assure fair and non-discriminatory enforcement of the CONASA-ILA Rules on Containers.

1. (a) All outbound (export) consolidated or LTL container loads (Rule 1 containers) shall be stripped from the container at the pier by deep[-]sea [sic] ILA labor and cargo shall be stuffed into a different container for loading aboard ship.

   (b) All inbound (import) consolidated or LTL cargo (Rule 1 containers) for distribution shall be stripped from the container and the cargo placed on the pier where it will be delivered and picked up by each consignee.

[x]

2. No carrier or direct employer shall supply its containers to any facilities operated in violation of the Rules on Containers including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder who is either a consolidator or a distributor. No carrier or direct employer shall operate a facility in violation of the Rule on Containers which specifically require that all containers be stuffed or stripped at a waterfront facility (pier or dock) where vessels normally dock.

A list shall be maintained of consolidation and distribution stations which are operated in violation of the Rules for

the information of all carriers and direct employers. Any container consolidated at or distributed from such facilities shall be deemed a violation and subject to the rules on stuffing and stripping.

3. A committee of carriers, together with CONASA-ILA Container Committee will develop uniform documentation which shall be required to be prepared and maintained by all carriers in order to readily identify all Rule 1 containers which are subject to stuffing and stripping by deep[-]sea [sic] ILA labor.

4. All carriers will distribute to all other carriers any and all information and devices which are being used by any persons to circumvent the Rules on Containers. Any carrier whose attention is brought to a violation of the Rules shall immediately cease such violation and report the matter to the appropritae CONASA-ILA Container Committee in its port.

5. The Container Committee in each CONASA port shall promulgate to all carriers and direct employers, and to the Container Committee in each CONASA port, any and all interpretations of the Rules on Containers as and when they are made. This will include uniform interpretations as and when they are issued by the CONASA-ILA Container Committee.

6. Any facility operated in violation of the Container Rules will not have service supplied to it by any direct employer and the ILA will not supply labor to such facility.

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INTERPRETATION 1.7

Overland Movement of Containers from CONASA Port to Non-CONASA Port

If a steamship line moves containers from a CONASA port to a non-CONASA port for the purpose of evading the rules on containers, the line is in violation of the CONASA-ILA Agreement. If the cargo is being moved to the non-ILA port to meet the requirements of local market conditions, and not for the purpose of evasion, then such movement is not within the rules.

[xi] INTERPRETATION 1.8

Importers Advertising Evasion of Rules

The ILA brought to the attention of CONASA that certain importers were circulating, in writing, methods developed by them to evade the rules on containers by issuing single bills of lading on what are in fact consolidated container loads of many beneficial owners. CONASA and ILA agreed that such evasion would be stopped wherever it was found.

[xii]

(c) Every import container destined to a point within 50-miles of a CONASA Port shall be delivered only on a delivery order. Every export container coming from a point within 50-miles of a CONASA Port shall be received only on a dock/cargo receipt. Such delivery orders and dock/cargo receipts shall certify the place of delivery and origin of the container, the name or names of the person to whom the cargo is being delivered and from

which it is shipped, the identity of the owner of the cargo, weight of the cargo, identity of the cargo and the origin and final destination of the container. Copies of such delivery orders and dock/cargo receipts shall be available to the local port Container Committee and the policing agency provided for in (e) below.

(d) The Container Committee in each CONASA Port shall promulgate to all carriers and direct employers, and to the Container Committees in each CONASA Port, any and all interpretations of the Rules on Containers as and when they are made. This will include uniform interpretations as and when they are issued. The CONASA-ILA Container Committee shall also promulgate uniform interpretations to local port Container Committees, as and when they are issued.

(e) Policing Agency—Each CONASA Port shall establish a method of policing and enforcing these Rules on a uniform and non-discriminatory basis. No such method shall be implemented until presented to and approved by the joint CONASA-ILA Container Committee.

Rule 10—Container Royalty Payments

The two Container Royalty payments required by the CONASA-ILA collective bargaining agreements shall be payable only once in the Continental United States. They shall be paid in that ILA Port where the container is first handled by ILA longshore labor at longshore rates. The

second container royalty payment (provided by paragraph 6 of the 1971-1974 CONASA-ILA Memorandum of Agreement) shall be continued and shall be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port by port basis. Containers originating at a foreign port which are transshipped at a United States port for ultimate destination to another foreign port ("foreign sea-to-foreign-sea containers") are exempt from the payment of container royalties.

[xiii]

APPENDIX A(v)

CONASA-ILA RULES ON CONTAINERS—1974

PREAMBLE

This Agreement made and entered into by and between the carrier and direct employer members of the CONASA Port Associations (hereinafter referred to collectively as "CONASA") and the International Longshoremen's Association, AFL-CIO ("ILA"), its Atlantic Coast District ("ACD") and its affiliated local unions in each CONASA port ("locals") covers all container work at a waterfront facility which includes but is not limited to the receiving and delivery of cargo, the loading and discharging of said cargo into and out of containers, the maintenance of containers, and the loading and discharging of containers on and off ships.

CONASA agrees that it will not directly perform work done on a container waterfront facility (as hereinafter defined) or contract out such work which historically and regularly has been and currently is performed by employees covered by CONASA-ILA Agreements, including

CONASA-ILA craft agreements, unless such work on such container waterfront facility is performed by employees covered by CONASA-ILA Agreements.

RULES

The following provisions are intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts which was performed at deepsea waterfront facilities. These rules do not have any effect on work which historically was not performed at a waterfront facility be deepsea ILA labor. To assure compliance with the collective bargaining provisions, the following rules and regulations shall be applied uniformly in all CONASA Ports to all import or export cargo in containers:

Definitions

(a) Loading a Container — means the act of placing cargo into a container.

(b) Discharging a Container— means the act of removing cargo from a container.

(c) Loading Containers on a vessel — means the act of placing containers aboard a vessel.

(d) Discharging Containers from a vessel — means the act of removing containers from a vessel.

(e) Waterfront facility — means a pier or dock where vessels are normally worked including a

container compound operated by a carrier or direct employer.

[xiv]

(f) Qualified Shipper — means the manufacturer or seller having a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the export cargo being transported and who is named in the dock/cargo receipt.

(g) Qualified Consignee — means the purchaser or one who otherwise has a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the import cargo being transported and who is named in the delivery order.

(h) Consolidated Container Load — means the container load of cargo where such cargo belongs to more than one shipper on export cargo or one consignee on import cargo.

Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

Rule 1—Containers to Be Loaded or Discharged by Deepsea ILA Labor

(a) Cargo in containers referred to below shall be loaded into or discharged out of containers only at a waterfront facility by deepsea ILA labor:

(1) Containers owned, leased or used by carriers (including containers on wheels and trailers), hereinafter "containers", which contain consolidated container loads, which came from or go to any point within a geographic area of any CONASA port described by a 50-mile circle with its radius extending out from the center of each port (hereinafter "geographic area") or

(2) Containers which come from a single shipper which is not the manufacturer ("manufacturer's label") into which the cargo has been loaded (consolidated) by other than its own employees and such containers come from any point within the "geographic area," or

(3) Containers designated for a single consignee from which the cargo is discharged (deconsolidated) by other than its own employees within the "geographic" area and which is not warehoused in accordance with Rule 2(B).

(b) Such ILA labor shall be paid and employed at deepsea longshore rates under the terms and conditions of the deep-sea ILA labor [xv] agreement in each CONASA port, including the provisions for all fringe benefits and any and all other benefits receivable by deep-sea ILA craft workers in each such Port. No cargo shall be loaded into or dis-

charged out of any container by ILA deep-sea labor more than once.

(c) All export consolidated cargo, described in 1(a)(1) and (2) above, shall be received at the waterfront facility by deep-sea ILA labor and such cargo shall be loaded into a container at the waterfront facility for loading aboard ship.

(d) All import consolidated cargo, described in 1(a)(1) and (3) above, shall be discharged from the container and the cargo placed on the waterfront facility where it will be delivered and picked up by each consignee.

(e) No carrier or direct employee shall supply its containers to any consolidator or de-consolidator. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all Rule 1 containers be loaded or discharged at a waterfront facility.

Rule 2—Containers Not to Be Loaded or Discharged by ILA Labor

Cargo in containers referred to below shall not be loaded or discharged by ILA labor:

A. Export Cargo:

(1) All cargo loaded in containers outside the "geographic area".

(2) Containers loaded with cargo at a qualified shipper's facility with its own employees.

(3) Containers loaded with the cargo of a single manufacturer (manufacturer's label).

(4) Consolidated container loads of mail, household effects of a person who is relocating his place of residence, with no other type of cargo in the container, or personal effects of military personnel.

B. Import Cargo:

(1) All cargo discharged from containers outside the "geographic area".

(2) Containers discharged at a qualified consignee's facility by its own employees.

(3) Consolidated container loads of mail, household effects of a person who is relocating his place of business, with no other type of cargo in the container, or personal effects of military personnel.

(4) Containers of a qualified consignee discharged at a bona fide public warehouse within the "geographic area" which comply with all of the following conditions:

[xvi]

1. The container cargo is warehoused at a bona fide public warehouse.

2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days; and

3. The cargo being warehoused (a) in the normal course of the business of the qualified consignee; (b) title to such goods has not been transferred from the qualified consignee to another.

The carrier on request will furnish all documentation and other information which permits the Container Committee in the port to determine whether conditions 1, 2 and 3 have been met. This exception shall not apply where cargo is warehoused for the purpose of avoidance or evasion of Rule 1. It is limited to containers warehoused as provided in the above conditions and any warehouse which does not conform to such conditions shall be deemed a consolidator or de-consolidator.

Rule 3—Batching

When an employer-member or carrier uses a trucker to remove or deliver containers in batches, or in substantial number, from or to a terminal to another place of rest (outside of its terminal) where containers are stored pending their delivery to a consignee (or after being received from a shipper and while waiting the arrival of a ship), for the purpose of reducing the work jurisdiction of the ILA or any of its crafts, such use is deemed to be batching and an evasion of these Rules in violation of the CONASA-ILA contract.

Rule 4—Headload

Where a single qualified shipper sends an export container which contains all of his own cargo to a waterfront facility and such container is not full, the carrier or direct employer may load this container with additional cargo at the waterfront facility. On import cargo, the carrier or direct employer may discharge any such additional cargo and send the remaining cargo in the container to the qualified consignee. The loading or discharging of cargo at ILA

ports shall be performed at a waterfront facility by deep-sea ILA labor.

Rule 5—Overland Movement of Containers from CONASA Port to Non-CONASA Port

If a carrier moves containers from a CONASA Port to a non-CONASA Port for the purpose of evading the Rules on Containers, the carrier is in violation of the CONASA-ILA Agreement. If the cargo is being moved to a non-CONASA-ILA Port in the normal course of business, and not for the purpose of evasion, then such movement is not in violation.

Rule 6—Importers Advertising Evasion of Rules

The circulation, in writing, by importers, of methods developed by them to evade the Rules on Containers by issuing single bills of lading [xvii] on what are in fact consolidated container loads shall be deemed a violation and all CONASA-ILA Container Committees shall be advised to stop such evasion at the waterfront facilities.

Rule 7—No Avoidance or Evasion

The above rules are intended to be fairly and reasonably applied by the parties. To obtain non-discriminatory and fair implementation of the above, the following principles shall apply:

(a) Geographic Area—Agreement in the Port to the geographic area as provided in Rule 1 is based on present consolidated movement patterns in the port. Should any person, firm or corporation for the purpose of evading the provisions of the Rules

on Containers, seek to change such pattern by shifting its operations to, or commencing new operations at, a point outside said agreed upon geographic area, then either party may raise the question whether said point should be included within the said geographic area, and upon agreement that the purpose of the shift in its operations was to evade the provisions of the Rules on Containers, then said point shall be deemed to be within the said geographic area for the purpose of these rules.

(b) Containers Owned, Leased or Used—Containers owned, leased or used by companies which are affiliated either directly or through a holding company with a carrier or a direct employer shall be deemed to be containers owned, leased or used by a carrier or direct employer. Affiliation shall include subsidiaries and/or affiliates which are effectively controlled by the carrier or direct employer, its parent, or stockholders of either of them.

(c) Liquidated Damages—Failure to load or discharge a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 1 and Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been loaded or discharged under the rules, then the carrier or its agent or direct employer

shall pay, to the Joint Container Royalty Fund, liquidated damages of $1,000 per container which should have been loaded or discharged. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in Rule 9(a) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.

(d) Any facility operated in violation of the Container Rules will not have service supplied to it by any direct employer and the ILA will not supply labor to such facility.

[xviii] Rule 8—Renegotiation and Cancellation—No Arbitration

These Rules shall be in effect for the term of the CONASA-ILA Agreement, provided, however, that either party shall have the right to cancel the Rules on Containers at any time on or after December 1, 1974, on thirty (30) days written notice of a desire to renegotiate the provisions of these Rules. Negotiations shall be held during such thirty (30) day period and if the parties are unable to agree by the end of such period, these Rules shall be deemed cancelled. Thereafter, the ILA shall have the right to refuse to handle containers and CONASA shall have the right to refuse to hire employees under the said Rules. The negotiations referred to above shall, under no condition, be subject to the grievance or arbitration of any CONASA-ILA Agreement.

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Rule 9—Enforcement of the Rules on Containers

To assure effective, fair and non-discriminatory enforcement of the above Rules, the following regulations shall apply:

(a) A Committee in each CONASA port represented equally by management and union shall be formed and shall have the responsibility and power to hear and pass judgment on any violations of these Rules. Any inability to agree shall be processed as a grievance under the applicable contract except as limited by Rule 8 hereof. A joint committee, known as the CONASA-ILA Container Committee, represented equally by management and labor and made up of representatives (to be mutually agreed upon) from each CONASA Port, namely, Boston, Rhode Island, New York, Philadelphia, Baltimore and Hampton Roads shall meet at least quarterly each year for the purpose of insuring uniformity in the interpretation of these Rules.

(b) A Committee of carriers, together with CONASA-ILA Container Committee will develop uniform documentation which shall be required to be prepared and maintained by all carriers in order to readily identify all Rule 1 containers which are subject to loading or discharging by deep-sea ILA labor. It shall be the obligation of employer-members to clearly mark each container's documentation as to whether or not it is a Rule 1 container, which shall be loaded or discharged. If a container's documentation is not clearly marked,

it shall be deemed a Rule 1 container and it shall be loaded or discharged by deep-sea ILA labor at the waterfront facility. With respect to all containers received at or delivered from the waterfront facility, a record of the same shall be made by ILA Checkers and Clerks. All carriers will distribute to all other carriers any and all information and devices which are being used by any person to circumvent the Rules on Containers. Any carrier whose attention is brought to a violation of the Rules shall immediately cease such violation and report the matter to the appropriate CONASA-ILA Container Committee and to the policing agency provided in (e) below in its port.

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[xix] APPENDIX A(vi)

CONASA-ILA RULES ON CONTAINERS—1975

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Rule 2—Containers Not to Be Loaded or Discharged by ILA Labor

Cargo in containers referred to below shall not be loaded or discharged by ILA labor:

A. Export Cargo:

• • • • •

(3) Containers loaded with the cargo of a single manufacturer (manufacturer's label) [at its facilities with its own employees.]

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[(5) There shall be no general warehouse exception applicable to export cargo.]

B. Import Cargo:

• • • • •

(4) Containers of a qualified consignee discharged at a bona fide public warehouse within the "geographic area" which comply with all of the following conditions:

1. The container cargo is warehoused at a bona fide public warehouse.

2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a [illegible]imum period of thirty or more days; [and stores the cargo for a minimum period of 30 days;] and

3. The cargo being warehoused (a) in the normal course of the business of the qualified consignee; (b) title to such goods has not been transferred from the qualified consignee to another.

The carrier on request will furnish all documentation and other information which permits the Container Committee in the port to determine whether conditions 1, 2 and 3 have been met. This exception shall not apply where cargo is warehoused for the purpose of avoidance or evasion of Rule 1. It is limited to containers warehoused as provided in the above conditions and any warehouse which does not conform to such conditions shall be deemed a consolidator or de-consolidator.

[xx] [(Clarification: In keeping with prior CONASA-ILA decisions trucking stations where containers are unloaded within the geographic area do not constitute bona fide public warehouses even where cargo is destined for delivery outside the geographic area).]

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Rule 9—Enforcement of the Rules on Containers

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[(f) Council of Container Carriers—There shall be organized promptly a Council of Container Carriers composed of representatives of every major container carrier who, subject to the direction of CONASA, shall meet with the ILA at all regular and special meetings of the CONASA-ILA Container meetings, and who shall participate in the

discussion and resolution of problems and interpretations of the Container Rules discussed at the said meetings.]

[(g) Powers of CONASA-ILA Container Committee—In order to permit the fair and non-discriminatory application of the Rules and to encourage the movement of cargo in all CONASA-ILA ports, the CONASA-ILA Container Committee is hereby empowered to make such amendments or modifications to these Rules as may be necessary to the equitable application of the principles of these Rules to particular cases.]

Rule 10—Container Royalty Payments

The two Container Royalty payments required by the CONASA-ILA collective bargaining agreements shall be payable only once in the Continental United States. They shall be paid in that ILA Port where the container is first handled by ILA longshore labor at longshore rates. The second container royalty payment (provided by paragraph 6 of the 1971-1974 CONASA-ILA Memorandum of Agreement) shall be continued and shall be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port by port basis. Containers orginating at a foreign port which are transshipped at a United States port for ultimate destination to another foreign port ("foreign sea-to-foreign-sea containers") are exempt from the payment of container royalties. [Container royalty payments shall be assessed against all containers moving across the continental United States by rail or truck under the foreign-to-foreign "LAND-

BRIDGE" system. The said royalty payments shall become due for all such containers moving through CONASA-ILA ports on and after July 1, 1975.]

[xxi] [Rule 11—Execution of Agreement

All carriers utilizing ILA labor in handling containers in any of the CONASA ports shall be bound by the CONASA and ILA Rules on Containers, and shall be required to execute the agreement between CONASA and ILA containing the said Rules on Containers. No contracting stevedore shall perform services for any carrier, private or governmental, unless such carrier has subscribed to this agreement as aforesaid.]

Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

[xxii] APPENDIX A(vii)

CONASA-ILA AGREEMENT—1977

RULES ON CONTAINERS

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Rule 8—Renegotiation and Cancellation—No Arbitration

[If any article, section, paragraph, clause or phrase of this Agreement shall, by any State, Federal or other law, or by any decision of any Court or Administrative Agency, be declared or held illegal, void or unenforceable, the entire Agreement shall terminate upon sixty (60) days written notice to the other party hereto and the parties agree to enter into negotiations in an attempt to renegotiate that provision of the Agreement which was nullified. If no agreement is reached within the sixty (60) day notice period, the ILA shall have the right to strike and CONASA shall have the right to refuse to hire employees under this Agreement. The negotiations referred to above shall, under no conditions, be subject to the grievance or arbitration provisions of this agreement, or of any Local Agreement.]

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Rule 10—Container Royalty Payments

The two Container Royalty payments, I & II required by the NYSA and CONASA-ILA collective bargaining agreements shall be payable only once in the Continental United States. They shall be paid in that ILA Port where the container is first handled by ILA longshore labor at longshore rates. The second container royalty payment (provided by paragraph 6 of the 1971-1974 NYSA and

CONASA-ILA Memorandum of Agreement) shall be continued and shall be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port by port basis. Containers originating at a foreign port which are transshipped at a United States port for ultimate destination to another foreign port ("foreign sea-to-foreign-sea containers") are exempt from the payment of container royalties. Container royalty payments shall be assessed against all containers moving across the continental United States by rail or truck under the foreign-to-foreign "LAND-BRIDGE" system. The said royalty payments shall become due for all such containers moving through NYSA and CONASA-ILA ports on and after July 1, 1975.

[An additional container royalty equal to the present container royalty of 35 cents, 70 cents and $1.00 per gross ton payable as provided in the November 16, 1960 Stein Award to be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port basis.

[xxiii] As provided in the May 12, 1977 Addendum between CONASA and ILA, effective May 1, 1977 the First Container Royalty Payment (provided for in Paragraph "6" of the 1971-77 CONASA-ILA Memorandum of Agreement) shall be doubled. Such additional container royalty payment shall be used exclusively for supplemental cash payments to employees covered by the CONASA-ILA Agreements, and for no other purpose.

The second Container Royalty shall be used as determined by the employers.

CONASA and the Carriers that the payment of container royalties as provided in their agreements is of the

essence to this agreement and, if for any reason during the term of this agreement such payments cannot be made in their present form, then CONASA and the Carriers shall provide, by some other form of assessment, for the payment of equivalent amounts to be used for the same purposes as said container royalties are presently used.]

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[xxiv] APPENDIX A(viii)

MANAGEMENT-ILA RULES ON CONTAINERS—1980

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Rule 6—IMPORTERS ADVERTISING EVASION OF RULES

The circulation, in writing, by importers, of methods developed by them to evade the Rules on Containers by issuing single bills of lading on what are in fact consolidated container loads shall be deemed a violation and all Management-ILA Container Committees, [including the Port Committees,] shall be advised to stop such evasion at the waterfront facilities.

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Rule 8—RENEGOTIATION AND CANCELLATION—
NO ARBITRATION

If any article, section, paragraph, clause or phrase of this Agreement shall, by any state, Federal or other law, or by any decision of any Court or Administrative Agency, be declared or held illegal, void or unenforceable, the entire Agreement shall terminate upon sixty (60) days written notice to the other party hereto and the parties agree to enter into negotiations in an attempt to renegotiate that provision of the Agreement which was nullified. [The said notice shall not be given prior to December 1, 1980.] If no agreement is reached within the sixty (60) day notice period, the ILA shall have the right to strike and Management shall have the right to refuse to hire employees under this Agreement. The negotiations referred to above shall, under no condition, be subject to grievance or arbitration under this agreement or under any local Agreement.

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Rule 10—Container Royalty Payments

The two Container Royalty payments [effective in 1960 and 1977 respectively, shall be continued and shall be used exclusively for supplemental cash payments to employees covered by the Management agreements, and for no other purpose. The remaining royalty payment effective in 1971, also shall be continued and shall be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port-by-port basis.] The Container Royalty payments shall be payable only once in the continental United States. They shall be paid in that ILA port where the container is first handled by ILA longshore labor, at longshore rates. Containers originating at a foreign port which are transshipped at a United States port for ultimate destination to another foreign port ("foreign-sea-to-foreign-sea containers") are exempt from the payment of container royalties. Container Royalty payments shall be assessed against all containers moving across the continental United States by rail or truck in the foreign-to-foreign "LAND-BRIDGE" system.

[xxv] Management and the Carriers agree that the payment of Container Royalties as provided in their agreements is of the essence of this agreement and, if for any reason during the term of this agreement such payments cannot be made in th[ei]r present form, the Management and the Carriers shall provide by some other form of assessment for the payment of equivalent amounts to be used for the same purpose as said Container Royalties are presently used.

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[xxvi] APPENDIX A(ix)

AGREEMENT BETWEEN MANAGEMENT AND ILA

1. Parties agree that the Rules on Containers will be placed in effect on January 1, 1981 in all ports from Maine to Texas, except in Philadelphia where an application for reconsideration will be made promptly.

2. In the event an injunction is issued in any port where the Rules have been placed in effect, or the Petition for Reconsideration in Philadelphia is denied, the ILA shall have the right to give the 60 day notice provided in paragraph 8 of the Containerization Agreement.

3. Any carrier who diverts cargo from one port to another to avoid the Rules shall, in addition to any other penalties, pay liquidated damages of $500 per container to the Pension Fund and $500 per container to the Welfare Fund.

4. The parties agree that counsel shall prepare an assessment agreement whose purpose shall be to encourage the stuffing and stripping of containers at on-pier facilities by reducing pier costs and improving productivity with the cost of such program to be borne by containerized automated cargo which would have been stuffed or stripped on pier if the Rules were in effect. Such program is to be an amendment to JSP, is to be submitted within 30 days of this date and is to be in operation only in the event the Rules are unenforceable.

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APPENDIX B

NOTICE TO MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A HEARING IN WHICH ALL SIDES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, IT HAS BEEN FOUND THAT WE VIOLATED THE LAW. ACCORDINGLY, WE POST THIS NOTICE AND WE WILL KEEP THE PROMISES WE MAKE IN THIS NOTICE.

WE WILL NOT give effect to, invoke, or in any other manner or by any other means enforce the contract and agreements known as the CONASA-ILA rules on containers, rules 1(a)(3) and 2B(2) as set forth in the HRSA-ILA collective-bargaining agreement or any other arrangement express or implied whereby the Council of North Atlantic Shipping Associations, and the Hampton Roads Shipping Association, on behalf of its employer-members, agree to cease or refrain from doing business with surface motor carriers to the extent that they engage in "short stopping" or the stripping of "shippers load" containers, for their exclusive benefit and pursuant to the traditional offshore practice of motor carriers, which is not rivaled by services rendered at the pier by marine operators and not perfo med traditionally by deepsea ILA labor.

WE WILL NOT seek or impose fines against employer-members of the Hampton Roads Shipping Association, including United States Lines, Inc., or any other per-

son engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with Associated Transport, Inc., Houff Transfer, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., or any other member of the Tidewater Motor Truck Association, provided that the terms hereof shall only apply with respect to the practice of said motor carriers whereby import containers are stripped for their exclusive benefit as an incident of traditional motor carrier practice neither created by containerization, nor rivaled by services rendered by marine operators or work performed at the piers by deepsea ILA labor.

WE WILL NOT coerce, or restrain the Council of North Atlantic Shipping Associations, Hampton Roads Shipping Association, or any of Hampton Roads Shipping Association's employer-members, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require such person to cease doing business with Associated Transport, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., and any other employer-member of Tidewater Motor Truck Association, to the extent that they are engaged in the above-defined practice.

WE WILL and do hereby notify our members, and other individuals employed by Hampton Roads Shipping Association, or any of its employer-members, that the CONASA-ILA rules on containers which have been negotiated between ILA and CONASA on behalf of Hampton Roads Shipping Association, shall not be applied to restrain, restrict, limit, fine or prohibit

handling containers bearing shippers' loads, to the extent handled within the limits of the above practice.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AFL-CIO, LOCALS 333, 846, 862, 921, 953, 970, 1248, 1355, 1429, 1458, 1624, 1736, 1783, 1784, 1819, 1840, & 1970
(Labor Organizations)

Dated ..... By .....
(Representative) (Title)

HAMPTON ROADS DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

ATLANTIC COAST DISTRICT COUNCIL, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

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THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 9100 Edward A. Garmatz Fed. Bldg. & Court House, 101 W. Lombard Street, Baltimore, Maryland 21201 (Tel. No. (301) 962-2915)

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APPENDIX C

NOTICE

TO ALL EMPLOYEES AND EMPLOYER-MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing in which all sides had the opportunity to present their evidence, it has been found that we violated the law by committing unfair labor practices. Accordingly, we post this notice and we shall keep the promises we make in this notice.

WE WILL NOT give effect to, invoke or in any manner or by any means enforce the contracts and agreements known as the CONASA-ILA rules on containers, rules 1(a)(3) and 2B(2), as set forth in the HRSA-ILA collective-bargaining agreement, or any other contract or agreement, express or implied, whereby CONASA, on behalf of HRSA, or HRSA on behalf of employer-members, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act, to the extent found unlawful in the Decision of the Administrative Law Judge.

WE WILL and do hereby notify United States Lines, Inc., and all other employer-members of HRSA that the provisions of the CONASA-ILA rules on containers which have been negotiated between ILA and CONASA on behalf of Hampton Roads Shipping Association, shall not be enforced to restrain, restrict, limit, fine, or prohibit handling of containers, with

respect to Associated Transport, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., and any other employer-member of Tidewater Motor Truck Association, to the extent that said containers are stripped solely for the exclusive benefit of motor carriers, pursuant to their traditional practice which is not rivaled by services traditionally rendered by marine operators and work performed by deepsea ILA labor.

HAMPTON ROADS SHIPPING ASSOCIATION
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

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Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

APPENDIX D

NOTICE

TO ALL EMPLOYEES AND ASSOCIATION-MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing in which all sides had the opportunity to present their evidence, it has been found that we violated the law by committing unfair labor practices. Accordingly, we post this notice and we shall keep the promises we make in this notice.

WE WILL NOT give effect to, invoke, or in any manner or by any means enforce the contracts and agreements known as the CONASA-ILA rules on containers, rules 1(a)(3) and 2B(2), as set forth in the HRSA-ILA collective-bargaining agreement, or any other contract or agreement, express or implied, whereby CONASA, on behalf of HRSA, or HRSA on behalf of its employer-members, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act, as found unlawful in the Decision of the Administrative Law Judge.

WE WILL and do hereby notify United States Lines, Inc., and all other employer-members of HRSA that the provisions of the contracts and agreements known as the CONASA-ILA rules on containers which have been negotiated between ILA and CONASA on behalf of Hampton Roads Shipping Association, shall not be enforced to restrain, restrict, limit, fine, or prohibit

handling of containers with respect to Associated Transport, Inc., to the extent that said containers are stripped solely for the exclusive benefit of motor carriers, pursuant to traditional motor carrier practice, which is not rivaled by services traditionally rendered by marine operators and work performed by deepsea ILA labor.

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATION
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

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Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

APPENDIX E

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT induce or encourage employees of Chesapeake Operating Company, or any other person subject to the National Labor Relations Act to engage in a strike, or refusal, in the course of their employment, to do work or perform services, or threaten, coerce, or restrain Chesapeake Operating Company or any other person subject to the National Labor Relations Act,

—where, in either case, an object thereof is to force or require any company or person to stop doing business with Shipside Packing Company, or to stop handling, loading, unloading or dealing with goods packed by Shipside, to the extent found unlawful in the attached Decision of the Administrative Law Judge.

WE HEREBY cancel and withdraw any orders or instructions given our members or any other individuals not to load, unload, or handle containers packed by Shipside Packing Company, to the extent that said containers are handled in conjunction with traditional general warehousing practices on behalf of a single shipper on a continuous basis whereby large quantities of cargo are regularly accumulated, stored, picked and packed for FSL export shipment.

WE HEREBY notify our members, and any other employees or individuals, that we have no objection to our members or any other employees loading or un-

loading, or handling cargo stuffed by Shipside Packing Company under the aforedescribed conditions.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, DISTRICT COUNCIL, BALTIMORE, MARYLAND; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 953 and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 333
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

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Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

APPENDIX F

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT: (1) Induce or encourage employees of Chesapeake Operating Company, Ceres Terminals, Inc., or any other persons, to engage in a strike, or refusal to work or to perform employment services, or (2) threaten, coerce, or restrain Chesapeake Operating Company, Ceres Terminals, Inc., or any person, in order to force or require any company or person to stop doing business with The Terminal Corporation, or to stop handling, loading, unloading, or dealing with containers to be stripped by The Terminal Corporation, in conjunction with traditional general warehousing functions of indefinite storage *and* deferred, partial distribution pursuant to a continuing relationship with an exporter or consignee.

WE HEREBY cancel and withdraw any orders or instructions given to our members or any other individuals not to unload, or handle containers to be stripped by The Terminal Corporation, under the above-stated conditions.

WE HEREBY notify our members, and any other employees or individuals that we have no objection to our members or any other employees unloading, or handling containers to be stripped by The Terminal Corporation under the above-stated conditions.

Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ATLANTIC COAST DISTRICT, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 333, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 953, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

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Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

APPENDIX G

NOTICE TO MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT participate in or give effect to any agreement, arrangement or plan, express or implied whereby members of Southeast Florida Port Association are to cease using, handling, transporting, or otherwise dealing in the products of any other processor, or to cease doing business with members of Custom Brokers and Forwarders Association of Miami, Inc., or any other person, to the extent that such an agreement arrangement or plan is invoked as an aid to organizing employees and encouraging their membership in the International Longshoremen's Association, or its affiliates.

WE WILL notify our members who are employed by employer-members of Southeast Florida Employers Port Association that WE WILL NOT participate in, or in any manner enforce an arrangement whereby access to maritime containers will be afforded or denied to members of Custom Brokers and Forwarders Association of Miami, Inc., or any other person engaged in work off the piers, on the basis of whether they do, or do not, employ members of the International Longshoremen's Association or its affiliates.

Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, LOCAL 1416
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 1416-A
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 1680
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 1526
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 1526-A
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 1922
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

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Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

APPENDIX H

NOTICE TO ALL EMPLOYEES AND EMPLOYER-MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT participate in or give effect to any agreement arrangement, or plan, express or implied, whereby employer-members of Southeast Florida Employees Port Association are to cease handling, transporting, or otherwise dealing in the products of any other processor, or to cease doing business with members of Custom Brokers and Forwarders Association of Miami Inc., or any other person, to the extent that such an agreement arrangement or plan is invoked as an aid to organizing employees and encouraging their membership in the International Longshoremen's Association, or its affiliates.

WE WILL notify all our members and employees that we will not seek, participate in, or enforce any arrangement agreement or plan, express or implied, whereby access to maritime containers is afforded or denied to members of Custom Brokers and Forwarders Association of Miami, Inc., or any other person engaged in work off the piers, on the basis of whether they do, or do not, employ members of the International Longshoremen's Association, or its affiliates.

Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

SOUTHEAST FLORIDA EMPLOYEES PORT ASSOCIATION
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

CHESTER, BLACKBURN & RODER, INC.
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

COORDINATED CARIBEAN TRANSPORT, INC.
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

EAGLE, INC.
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

ELLER & COMPANY, INC.
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

Appendix I—Initial Decision of National Labor Relations Board Administrative Law Judge Joel M. Harmatz

HARRINGTON & COMPANY, INC.
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

STRACHER SHIPPING COMPANY
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

MARINE TERMINALS, INC.
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

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Office Supreme Court, U.S.
FILED
JUL 8 1982
ALEXANDER L. STEVAS,

No. 81-2196

In the Supreme Court of the United States

OCTOBER TERM, 1981

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether rules in a tariff of a common carrier by water imposing on the users of that carrier's services limitations related to the availability and handling of cargo containers are exempt from regulation by the Federal Maritime Commission because such rules are derived from a collective bargaining agreement.*

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*This brief is filed on behalf of the Federal Maritime Commission and the United States. Both were parties in the court of appeals.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2196

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 672 F. 2d 171. The Report and Order of the Federal Maritime Commission (Pet. App. 48a-60a) and the Initial Decision (Pet. App. 61a-120a) are reported at 21 F.M.C. 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. 121a-122a) was entered on March 2, 1982. The petition for a writ of certiorari was filed on May 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES

The relevant statutes are set forth at Pet. App. 123a-132a.

STATEMENT

1. When it started operations in 1974, the Puerto Rico Maritime Shipping Authority (PRMSA), a common carrier by water regulated by the Federal Maritime Commission (FMC or Commission), adopted in its tariff certain rules on the use of containers. Those rules required that any containerized shipment moving from or to points within 50 miles of any port must be "stuffed" (loaded) or "stripped" (unloaded) by longshoremen on the pier, unless its contents: (1) were those of a single beneficial owner and loaded or unloaded at the owner's premises by the owner's employees, (2) were stored at regular rates at a public warehouse for 30 days prior to distribution, or (3) consisted of mail, household goods, or personal effects of military personnel (Pet. App. 11a-12a, 64a-65a, 90a). The tariff also provided that the carrier would not provide containers to any consolidator[1] or other person within the 50-mile zone whose shipments would not come within one of those exceptions (*id.* at 13a, 102a-103a), and any nonconforming shipment would be stripped and restuffed before it could be loaded aboard ship, a function for which the shipper would be required to pay a "transfer charge" (*id.* at 66a). If a nonconforming container were not stripped and restuffed at the pier, the shipper would have to pay "liquidated damages" of $1,000 per container (*id.* at 65a-66a).

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[1] A consolidator combines the goods of various shippers into a single container and delivers the container to the pier. See Pet. App. 6a-7a.

Except to the extent they passed on labor costs and liquidated damages to shippers, these tariff rules were copied *verbatim* from a 1974 collective bargaining agreement with the International Longshoremen's Association (ILA), to which PRMSA was a party (Pet. App. 14a-15a).[2]

2. The Commission found, after an evidentiary hearing, that the tariff rules were unjustly discriminatory and preferential and imposed unreasonable practices and charges on shippers, in violation of Sections 14, 16, and 18(a) of the Shipping Act of 1916 and Section 4 of the Intercoastal Shipping Act of 1933, 46 U.S.C. 812, 815, 817(a), and 845a (Pet. App. 59a, 120a). It recognized that the ILA had sought through the collectively-bargained limitations on availability and handling of containers (hereinafter "50-mile rule") to preserve work that it claimed was historically done by longshoremen (*id.* at 80a-90a), and presumed that the 50-mile rule was lawful under the labor statutes (*id.* at 55a, 107a). It held, however, that this purpose did not justify the imposition of unreasonable and discriminatory tariff rules upon certain classes of shippers, particularly small shippers not able to tender or receive full container loads, and those tendering full container loads who did not have their own employees to load or unload containers (*id.* at 53a-55a, 99a-107a). The FMC found that implementation of PRMSA's tariff rules has serious detrimental consequences, such as forcing one consolidator out of business at two ports, causing another to curtail its service and lose customers, and making a third temporarily cease operations at one port (*id.* at 95a-99a). Such discrimination against consolidators was found to have an adverse impact on the underlying small shippers (*id.* at 100a-101a).

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[2]This was the same collective bargaining agreement before the Court in *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490 (1980).

Although absent their roots in the collective bargaining agreement PRMSA's tariff rules would have been unlawful because they violated PRMSA's basic common carrier obligation to provide transportation service in a reasonable and nondiscriminatory fashion, the Commission considered exempting the rules from the agency's jurisdiction because of their labor origins. It noted, however, that neither a tariff implementing a collective bargaining agreement nor the collective bargaining agreement itself was *per se* exempt from FMC jurisdiction (Pet. App. 55a-59a, 108a-113a, 114a-117a). Weighing the policies involved, the FMC found that assertion of jurisdiction over a single carrier's tariff would not establish Commission jurisdiction over the collective bargaining process, nor would it create a requirement of pre-implementation approval for agreements (*id.* at 55a-59a, 108a, 112a-113a). On the other hand, PRMSA's tariff imposed terms on persons outside the collective bargaining unit, and those terms affected PRMSA's basic common carrier obligation. In these circumstances the Commission concluded that PRMSA must perform its common carrier obligations in a reasonable and nondiscriminatory fashion regardless of the provisions of the collective bargaining agreement (*id.* at 52a-55a, 108a-113a). To ensure minimal interference with labor concerns, however, the Commission allowed PRMSA 30 days in which to cancel its rules and to fashion its own amendments in conformity with the Commission's decision rather than immediately striking the offending provision from PRMSA's tariff (*id.* at 59a).

3. On a petition for review, the court of appeals affirmed the jurisdiction of the Commission over PRMSA's tariff rules (Pet. App. 4a, 18a-38a, 40a-46a).[3]

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[3]The court also retained jurisdiction of the case, and *sua sponte*, remanded the record to the Commission for additional consideration of the question of violation of the shipping statutes in light of this Court's

The court analyzed the purpose and background of the 50-mile rule in the collective bargaining agreement (Pet. App. 4a-10a), as well as its effects on longshoremen and on shippers (*id.* at 11a-14a), noting that there was a basic difference in the function and effect of the rules in the carrier/union and the carrier/shipper contexts (*id.* at 21a, 37a-38a; footnotes omitted):

> The [tariff] Rules govern the relationship between labor and management; incorporated into tariff provisions filed by steamship companies, they also govern the relationship between shipping customers and steamship operators. * * * [Since] the Rules have direct and probable effects on shippers' interests and on competition in the shipping industry, both of which are subject to FMC regulation * * * we are unable to conclude that the shipping interests are either indirect or insignificant in relation to collective bargaining factors. Therefore, the FMC has jurisdiction to consider the legality of the Rules on Containers under the shipping laws.

The court found it unnecessary to decide whether the Maritime Labor Agreements Act of 1980 (MLAA), Pub. L. No. 96-325, 94 Stat. 1021 *et seq.*, which modified Commission jurisdiction over collective bargaining and related agreements, had also removed the Commission's jurisdiction

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decisions in *FMC* v. *Pacific Maritime Association*, 435 U.S. 40 (1978), and *NLRB* v. *International Longshoremen's Association*, *supra* (Pet. App. 39a). Judge MacKinnon dissented from the remand since there had been no challenge on appeal to anything other than the Commission's jurisdiction (Pet. App. 18a), and he believed there was nothing in either decision that required reconsideration by the Commission (*id.* at 46a-47a).

over PRMSA's tariff,[4] because that statute provides that it "shall not affect * * * formal Commission proceedings commenced prior to the date of enactment of this Act" (Section 6, 94 Stat. 1022; Pet. App. 26a, 126a). The court also declined to decide whether the principles governing exemption of agreements from Section 15 of the Shipping Act, 46 U.S.C. 814, necessarily applied to tariff provisions as opposed to provisions in collective bargaining agreements. In this regard, the court noted that even if Section 15 exemption principles apply, the tariff's imposition of restrictive terms on the users of PRMSA's transportation services would defeat a claim of exemption (Pet. App. 34a-38a; see also *id.* at 55a-59a, 114a-117a).[5]

Judge MacKinnon concurred in the court's conclusions with respect to the MLAA and the Commission's jurisdiction over PRMSA's tariff rules (Pet. App. 40a). He concluded, however, that there was no exemption under the shipping statutes for activities other than those under Section 15, and that the Commission in such cases should assert jurisdiction over such labor related activities, weighing the

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[4]Section 5 of the MLAA provides that "* * * nothing in this section shall be construed as providing an exemption from the provisions of * * * [the shipping statutes] for any rates, charges, regulations, or practices of a common carrier by water * * * which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement" (94 Stat. 1022; Pet. App. 125a-126a).

[5]The Commission had argued that when a tariff rather than a provision in a collective bargaining agreement is directly involved, there is no exemption as such from the shipping statutes. Rather, the Commission argued, it would consider labor policy as a factor in determining whether a practice is unjust or unreasonable and in selecting the form of relief to be granted. See, *e.g.*, *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 170 (1962); Pet. App. 34a-35a; see also *id.* at 53a-55a, 104a-113a. The Commission had also argued that, assuming arguendo Section 15 principles apply, PRMSA's tariff was not exempt from the agency's jurisdiction, and that it had so found (Pet. App. 35a; see also *id.* at 55a-59a, 114a-117a).

labor background and effects as factors to be considered in determining the lawfulness of such activities (*id.* at 40a-46a). Assuming that the same labor exemption principles applied to tariffs as to labor agreements, he agreed with the court's conclusion in denying an exemption here (*id.* at 46a).

4. Following remand of the record by the court of appeals, the Commission reconsidered and reaffirmed its original findings of violation. The record has now been returned to the court of appeals and the parties have filed cross motions for summary disposition.

The substantive controversy underlying these cases is also the subject of other pending proceedings. In its related Docket No. 81-11, the Commission is conducting a broad investigation of several carriers to determine whether they may lawfully impose on shippers the 50-mile provisions in their present collective bargaining agreements (Pet. App. 25a n.98). It has issued an "Interim Report and Order" in No. 81-11 holding that the MLAA preserved its jurisdiction over such provisions when imposed by carriers against shippers, even when the carriers failed to incorporate the rules in their tariffs, and it has referred the issue of violations to an Administrative Law Judge for evidentiary proceedings. The petitioners here as well as other parties to that proceeding have appealed the "Interim Report and Order" to the court of appeals. *New York Shipping Association* v. *FMC*, No. 82-1347 (D.C. Cir., filed Mar. 31, 1982).[6]

The validity of 50-mile rules in collective bargaining agreements under the labor laws is still in issue before the NLRB following remand by this Court in *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490 (1980).

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[6]On June 21, 1982, the court of appeals granted petitioners' motion to have those proceedings deferred until this Court rules on the pending petition.

On September 29, 1981, an Administrative Law Judge rendered an initial decision upholding the validity of the rules in some respects (Pet. App. 150a-367a),[7] but, pursuant to an injunction obtained by the NLRB, implementation of the rules has been stayed since February 24, 1981, pending the NLRB's final determination. See *Pascarell* v. *New York Shipping Association*, No. 81-13 (D.N.J.), aff'd, 650 F. 2d 19 (3d Cir.), cert. denied, No. 80-2095 (Oct. 5, 1981).[8]

ARGUMENT

The interlocutory decision of the court of appeals, under a statutory structure that has since been revised, does not warrant review by this Court. In any event, the decision of the court of appeals was correct and does not conflict with any decision of any other court of appeals.

1. Given the court of appeals' remand of the record for the Commission to determine the issue of statutory violation, the decision on exemption challenged in the petition is of an interlocutory nature and not suitable for immediate review. *E.g., Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916). In fact, the proceedings on remand have concluded and the case is now pending in the court of appeals for decision on the merits. Should petitioners prevail on the merits there would be no cause to review the decision below. On the other hand, should the questions now pending in the

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[7]The NLRB Administrative Law Judge, while upholding the rules under the labor laws in some respects, recognized that Shipping Act standards and policies were different (Pet. App. 21a, 268a).

[8]Antitrust actions based on the 50-mile rules have been stayed pending resolution of the proceedings before the NLRB. See, *e.g., Consolidated Express, Inc.* v. *New York Shipping Association*, 641 F. 2d 90 (3d Cir.), mandamus and prohibition denied *sub nom. In re International Longshoremen's Association*, 451 U.S. 905 (1981).

court of appeals be decided adversely to petitioners, the exemption issue—the only question presented in the petition—may be reviewed by writ of certiorari after a final decision of the court of appeals on the violation issue. See *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973). Moreover, no special circumstances warrant interlocutory review here. Implementation of the 50-mile rule has been enjoined pending a decision by the NLRB on the legality of the underlying collective bargaining contract provisions, and the shipping law violation issue is already back before the court of appeals in this case. Thus, even if the decision below merited review by this Court, the current petition would be premature.

In any event, the specific issue presented by this proceeding will never arise again in the same legal context in which it appears here. The MLAA, enacted in 1980, is applicable to future proceedings of this nature, and, as noted above, the petitioners here have already initiated proceedings to secure a judicial interpretation of that statute.

2. Contrary to petitioners' contention (Pet. 11-12), *Intercontinental Container Transport Corp.* v. *New York Shipping Association*, 426 F. 2d 884 (2d Cir. 1970) ("*ICTC*"), and *Consolidated Express, Inc.* v. *New York Shipping Association*, 602 F. 2d 494 (3d Cir. 1979), vacated and remanded, 448 U.S. 902 (1980) ("*Conex*"), do not conflict with the decision below. Both *ICTC* and *Conex* rejected the argument that the 50-mile rule in a collective bargaining agreement was subject to the antitrust laws solely because it had an adverse effect on off-pier container station operators who competed with employer signatories for the work of stuffing and stripping containers. The issue in this case is entirely different. First, those cases dealt with the question of exemption from the antitrust laws not the shipping laws. As this Court explained in *FMC* v. *Pacific Maritime Association*, 435 U.S. 40, 63 (1978) ("*PMA*"):

> it will not necessarily be a misapplication of the [shipping] statutes if the exemption for collective-bargaining contracts from Shipping Act requirements is not always exactly congruent with the so-called labor exemption from the antitrust laws * * *.

Once a carrier implements the labor agreement by incorporating its terms into tariff rules, that action must be weighed against the policies underlying the shipping statutes. Those statutes were designed to protect the competitive interests of shippers by regulating the carrier-shipper relationship, and they have historically extended this protection to freight consolidators and their underlying shippers. See, *e.g.*, *ICC* v. *Delaware, L. & W. R.R.*, 220 U.S. 235 (1911). Thus the Commission and the court of appeals, having necessarily found that the tariff rules directly imposed terms on shippers and substantially affected shipping interests which the FMC is charged with regulating, properly concluded that they were not exempt from Shipping Act regulation (Pet. App. 37a-38a, 59a, 106a 107a).

Moreover, the labor exemption to the antitrust laws is not a spontaneous judicial construct, but derives from express legislative grants of antitrust immunity and the practical need to accommodate the operation of laws which permit the "eliminat[ion] of competition over wages and working conditions" and those which prohibit anticompetitive agreements in the business market. *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616, 621-622 (1975). Similarly, this Court found a basis for a labor exemption from Section 15 of the Shipping Act, 46 U.S.C. 814, in *PMA*, 435 U.S. at 57-58. Petitioners have adduced no express statutory exemption from the shipping law provisions applicable to this case, nor any statutory

directive that would guide the courts or the agency in deciding whether a union's interest in negotiating a particular work preservation formula should take precedence over the FMC's mandate to protect shippers from discrimination and unreasonable practices by common carriers and terminal operators. The rules applicable to commercial agreements in general should not necessarily be engrafted onto statutory regimes enacted precisely because of the special role that common carriers play in an industrial economy. Under such circumstances, it behooves the Commission to be sensitive to labor interests in shaping any relief to be granted (*Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 172-174 (1962)), but the court of appeals was entirely correct in concluding that the agency did not lose jurisdiction "in the first instance [to] determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty." *Carpenters' Union* v. *NLRB*, 357 U.S. 93, 109 (1958). Because a union and an employer "must bargain does not mean that the agreement reached may disregard other laws." *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665 (1965).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 81-2196

In the Supreme Court of the United States

OCTOBER TERM, 1982

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2196

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v.

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SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

In light of developments that occurred the day we filed our Brief in Opposition, the federal respondents submit this supplemental memorandum pursuant to Rule 22.6 of the Rules of this Court.

As we noted in our earlier brief (Br. in Opp. 8), the court of appeals decision that is the subject of the petition had remanded the record to the Federal Maritime Commission (FMC). When our brief was filed, the most recent action in the case was the FMC's order reaffirming its original findings of violation and discontinuing the proceeding (*id.* at 7). On July 2, 1982, however, the Court of Appeals for the District of Columbia Circuit issued a supplemental opinion following remand in which it vacated the part of FMC's order that discontinued the proceeding. The court of

appeals further directed the Commission to defer action until this Court rules on the petition for certiorari and "until * * * [the Commission] has reached its final decision in its Docket No. 81-11 * * *," a related proceeding now pending before the FMC (Reply Br. App. 2a).[1]

The court of appeals' most recent order makes the decision below less ripe for review than it appeared at the time our Brief in Opposition was filed. Far from making final determinations with respect to the lawfulness under the shipping laws of the practices here in issue, the court of appeals made no findings on the matter and directed that the Commission defer action.[2] Implementation of the practices at issue is still enjoined pending a decision by the National Labor Relations Board on the legality of the underlying collective bargaining contract provisions (see Br. in Opp. 9). Accordingly, even if the decision below merits review, there is no reason for such review at this time.

---

[1]A copy of the court of appeals' supplemental opinion following remand is appended to Petitioners' Reply Brief.

[2]Petitioners' reply brief contains characterizations of both the court of appeals' supplemental opinion and our position with respect to ...at opinion that are inaccurate. Because the opinion was filed the same day as our brief, we have had no opportunity to address these matters. We consider it misleading for petitioners to characterize as "simply untrue" our contention that the " 'proceedings on remand have concluded and the case is now pending in the court of appeals for decision on the merits.' " Reply Br. 2. Our assertion was completely true when made on the information then available. Moreover, petitioners' statement that the court of appeals "vacated the Federal Maritime Commission's decision on remand" (*ibid.*) suggests that the agency's findings were vacated. Only the "order that these proceedings be discontinued" was vacated (see Reply Br. App. 2a). The court of appeals at no point held the agency's findings to be incorrect, much less vacated any of them. It merely directed the agency to defer action and to reconsider its conclusions following this Court's action and the resolution of FMC Docket No. 81-11.

For the foregoing reasons, as well as those set forth in our Brief in Opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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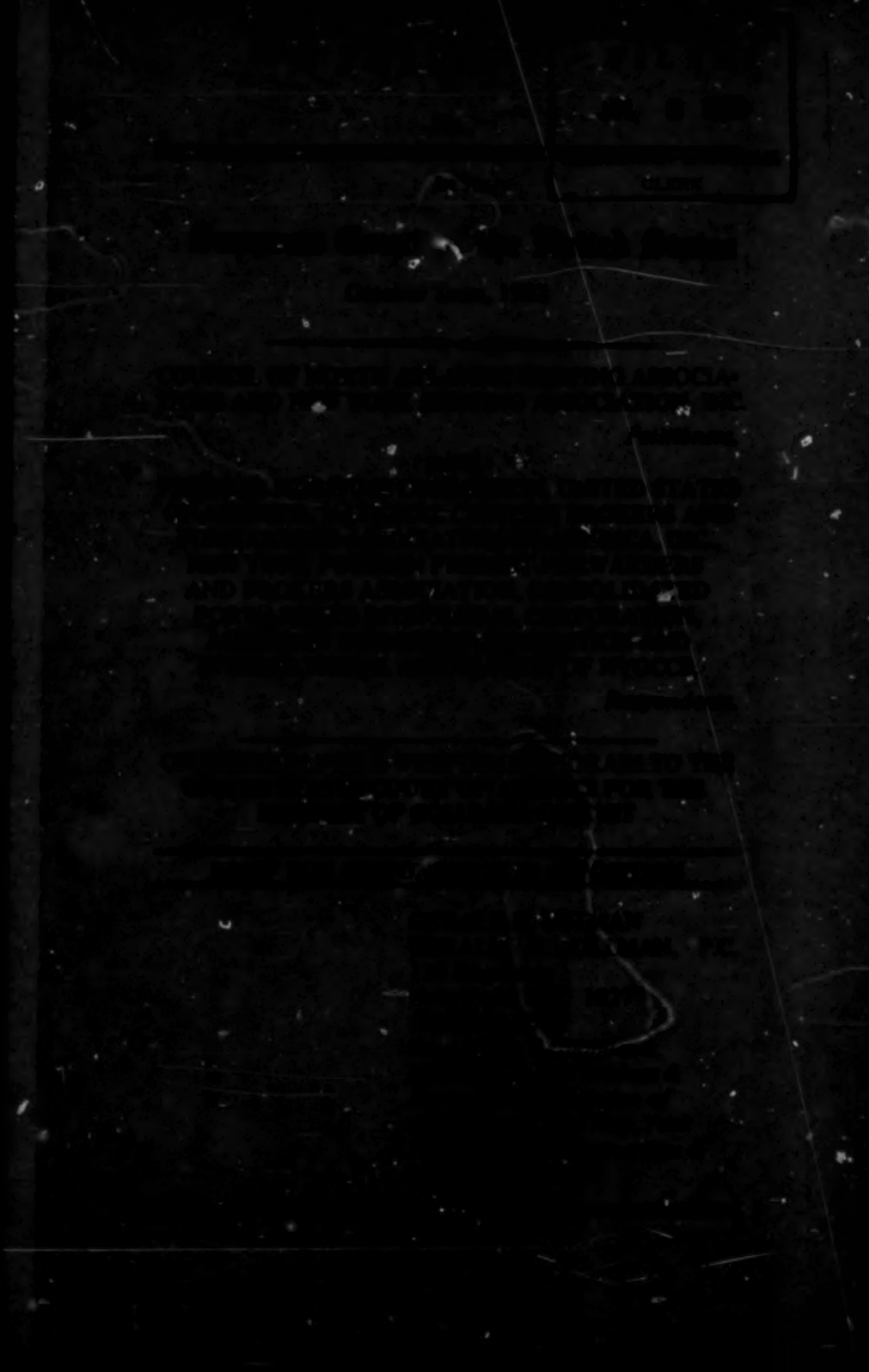
SEPTEMBER 1982

DOJ-1982-09



QUESTION PRESENTED

Should the American shipping public be deprived of protection under federal shipping laws against concededly illegal practices of ocean carriers on the sole ground that such practices arise out of the provisions of a collective bargaining agreement?

JURISDICTION

The judgment of the court of appeals (App. D at 121a-122a) was entered on March 2, 1982. The petition for certiorari was filed within 90 days thereof. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) (1976).

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. . . . . .

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS AND NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC., NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, CONSOLIDATED FORWARDERS INTERMODAL CORPORATION, AMERICAN IMPORTERS ASSOCIATION AND INTERNATIONAL ASSOCIATION OF NVOCCS,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported officially at 672 F. 2d 171. A copy is reproduced as Appendix A in the separately bound appendix to this petition. (App. A at 1a-47a). The decision of the Federal Maritime Commission ("FMC" or "Commission") appears officially at 21 F. M. C. 1 (1978) and a copy is reproduced in the separately bound appendix. (App. B at 48a-60a). The Initial Decision of the FMC's administrative law judge (App. C at 61a-120a) appears officially at 21 F.M. C. 7 (1975).

STATUTES

The Maritime Labor Agreements Act ("MLAA"), Pub. L. No. 96-325, 94 Stat. 1021(Aug. 8, 1980), which petitioners contend is relevant to the petition

herein was not a factor in the decision below. Indeed, the court of appeals unequivocally stated that the MLAA "has no bearing on the FMC's jurisdiction over the Rules on Containers in Dockets Nos. 73-17 and 74-40" (App. A at 26a), because the law was intended to have only prospective application and did not affect Commission proceedings, such as the dockets herein, commenced prior to the date of its enactment. While petitioners are correct in stating that the court of appeals addressed the MLAA (Pet. p. 9, fn. 15), it did so only to dispose of petitioners' misplaced reliance upon it. There is no support for petitioners' assertion that the court of appeals' denial of the non-statutory exemption was "influenced by its

interpretation of the MLAA". (Pet. p. 9, fn. 15).

Similarly unsupported is petitioners' contention that the Labor Management Relations Act ("LMRA"), §§8(b)(4) and 8(e), 29 U. S. C. §158(b)(4) and 158(e) (1976) is involved in this petition. The court of appeals did not address the LMRA further than to point out that "(t)he NLRB's interpretation of Sections 8(b)(4) and 8(e) does not answer the questions the FMC is required to ask - do the Rules unduly discriminate against certain shippers, and are they unjust and unreasonable?" (App. A at 21a-22a).

STATEMENT OF THE CASE

To the extent necessary to frame the legal questions involved, the facts appear in the Initial Decision of the

FMC's administrative law judge (App. C at 61a-120a), the Final Report and Order of the FMC (App. B, at 48a-60a) and the opinion of the court of appeals.(App. A at 1a-47a).

This case arises out of the inclusion in a steamship carrier's tariff of the 1974 Rules on Containers ("Rules"). The Rules constitute the response of the International Longshoremen's Association ("ILA") to what it perceived as the displacement of ILA labor occasioned by the advent of "containerization" in U. S. ocean-borne foreign commerce. The background and history of the development of container technology and the aggressive response of the ILA thereto is amply set forth in the opinion of the court of appeals. (App. A at 4a-11a).

The advantages of containerized transportation to the American shipper were well documented in the record before the FMC and were referred to and considered by the court of appeals in rendering its decision.(App. A at 5a-7a, fns.10-20).

Briefly, the benefits of containerization to American commerce include shorter delivery times, a single bill of lading, reduced export packaging costs, and reduced risk of loss, damage and pilferage at dockside.(App.A at 7a, fns.17-19). Simply put, containerization represented a quantum leap in efficiency in U.S. import and export trade over the traditional "breakbulk" method of transportation.

While the Rules have been termed a compromise between the steamship and stevedoring companies represented by petitioners on the one hand and maritime workers represented by the ILA on the other, the Rules as incorporated into the steamship carrier tariffs impose burdens on other persons who were not parties to the negotiation of the Rules. Specifically affected, although without voice in the formulation of the Rules, were importers, exporters, consolidators, forwarders, distributors and others processing shipments within the arbitrary 50-mile radius of a covered port. (App. A at 13a and 38a). The Rules require that all containers originating from or destined for points within the 50-mile zone be unloaded

("stripped") and repacked ("stuffed") into a different container at the pier by ILA labor unless one of three exceptions applies. (App. A at 11a-12a). First, a container is allowed free movement across the pier if the contents are owned by a single beneficial owner and are loaded or unloaded by the owner's own employees at its own facility. Unobstructed movement across the pier of an import container is also permitted where the contents are stored at a public warehouse at regular rates for 30 days prior to distribution. Third, containers of mail, household goods of persons changing residences and personal effects of military personnel may move freely regardless of their point of origin or destination.

The burdens imposed by the Rules fall squarely on the shoulders of the small shipper, consolidator or consignee. He is prevented from taking full advantage of the benefits of containerization because of the increased costs of stripping and repacking an already loaded container. (App. A at 13a-14a, App. C at 95a-99a).

The enforcement provisions of the Rules also mandate the blacklisting of the non-vessel operating common carriers ("NVOCC") and consolidators by forbidding carriers or their direct employees to supply containers to them. (App. I at 331a).

The FMC, whose primary responsibility is the protection of American shippers under the Shipping Act, 1916

and the Intercoastal Shipping Act, 1933, (See court of appeals decision, J. McKenna, concurring in part and dissenting in part, App. A. p. 45a) from unequal and discriminatory treatment by carriers, initiated an investigation into the discriminatory effect of the Sea-Land and later the PRMSA tariff, which incorporated the Rules verbatim.

DECISIONS BELOW

The Initial Decision of the ALJ, subsequently adopted by the Commission, held that the Commission had jurisdiction to review the PRMSA tariff provisions and found the tariff provisions to be in violation of sections 14 Fourth, 16 First and 18(a) of the Shipping Act, 1916 and of section 4 of the Intercoastal Shipping Act, 1933. Contrary to the bald

assertions made by petitioners (Pet. at 8), the Commission's reasons for its decision are not at all unclear, nor did the Commission "misread" this Court's earlier decisions. The ALJ based his determination on "the fundamental truth that the FMC has jurisdiction over tariffs . . . " (App. C at 107a). Similarly, the Commission pointed out that,unlike the agreements subject to preimplementation filing and approval under §15 of the Shipping Act, 1916 at issue in FMC v. Pacific Maritime Association ("PMA") 435 U. S. 40 (1978) and Volkswagenwerk Aktiengesellschaft v. FMC ("Volkswagen"), 390 U. S. 261 (1968), there was "no such agreement at issue here. What we have here is merely the unilateral implementation of a rule

founded in a collective bargaining agreement." (App. B at 59a).

The court of appeals took the identical approach. It was acutely aware and reiterated numerous times that what it had before it for review were "tariff provisions incorporating the Rules on Containers." (emphasis added) (App. A at 14a, 15a, 18a, 19a, 21a, 28a, 35a, n. 125, 37a).

ARGUMENT

I

THERE ARE NO SUBSTANTIAL QUESTIONS OF FEDERAL IMPORTANCE TO BE CONSIDERED

There is no support for petitioners' assertion (Pet. at 10) that the District of Columbia Circuit was presented with "intertwined federal labor, antitrust and shipping questions." Nor can it be

accurately stated that the court of appeals found the question before it any more "substantial and significant" (Pet. at 10) than other matters which regularly come on to be heard by the court.

There was nothing intertwined about the decision. The court of appeals merely employed the established standards of United Stevedoring Corp. v. Boston Shipping Association, ("Boston Shipping") 16 FMC 7 (1962) to hold that the FMC had jurisdiction to review the terms of a carrier's tariff, notwithstanding the petitioners' claims of a blanket labor exemption. The Boston Shipping standards were adopted by this Court in PMA wherein it was held

that there is no categorical exemption from the shipping laws for anti-competitive collective bargaining contracts.

Furthermore, it is a gross overstatement to say that the decision below has "nationwide ramifications". There is no evidence in the record that any union other than the ILA has adopted similar rules. Rather, the decision resolves a specific issue - whether steamship lines, coerced by an agressive union to adopt rules labelled "work preservation" (in reality, the rules would be better termed "work acquisition") should enjoy a blanket exemption from the proscriptions of our federal shipping laws, notwithstanding

the well documented (and uncontested[1]) disastrous effect of the Rules on the American shipping public. (App.A at 37a-38a).

The court of appeals made clear that its decision was limited to the labor exemption from the shipping laws and did not affect the labor exemption in the antitrust context. It drew a careful distinction between the two, stating that "even if the Rules are exempt from antitrust scrutiny...they might not be exempt from the shipping laws and vice versa." (App. A at 38a, fn.136).

[1]Petitioners asserted before the court of appeals that they held "in reserve" their challenge to the FMC's finding that the tariff rules violated the substantive portions of the shipping laws. Petitioners have no option to hold any argument in reserve on an appeal. Having failed to raise the substantive finding, petitioners have, in effect, conceded that the FMC's finding was correct.

Petitioners' characterization of the issues presented as being somehow "intertwined" and the assertion that the decision below has ramifications beyond the shipping law is merely an attempt to cloud the purely shipping law questions presented and to accrete to the petition greater significance than it truly possesses.

II.

THERE IS NO "RECURRING UNCERTAINTY" CONCERNING THE LABOR EXEMPTION

Petitioners' claim that the court of appeals somehow "included in the labor exemption equation ... (a) factor which would automatically remove the exemption because of the effects of the labor contract upon third parties" (Pet. at 12-13) is simply wrong.

The court considered in detail each of the four criteria advanced in Boston Shipping and adopted in PMA. Rather than seize upon any one of the criteria as dispositive of the exemption issue, the court proceeded to analyze the Rules in light of all four Boston Shipping guidelines (App. A at 36a,fn.127) before concluding that although the Rules satisfied the first three, they failed to satisfy the fourth. It recognized that "(a)lthough none of the criteria is 'determinative', consideration of each factor facilitates the balancing of an agreement's effect on the business market against the impact on collective bargaining." (App. A at 36a).

Thus, far from adopting a "pure effects test" and thereby abdicating its judicial responsibility to balance the sometimes competing policies of federal labor law and shipping law (Pet. at 13), the court undertook the reasoned and balanced analysis called for by Boston Shipping and PMA.

Ironically, the true proponents of judicial abdication have always been petitioners. Their contention throughout has been that "the FMC completely lacks jurisdiction over the PRMSA tariff provisions in question because they are work preservation rules derived directly from a collective bargaining agreement". (App. A at 18a). The petitioners' categorical imperative, however, was soundly rejected by this court in PMA

precisely because the claim of total immunity contravened the clear and specific grant of authority bestowed on the FMC by Congress to protect American shippers from discriminatory treatment. It is surely the height of absurdity for petitioners to criticize the court of appeals for failing to reconcile competing statutory directives when petitioners have themselves invariably asserted a meat-axe approach of total immunity.

Petitioners sound a disturbing note when they assert that the ILA has "voiced its indignation" (Pet. at 10, n. 17) over what it perceives as the FMC's "intrusion" into its domain. It is not correct to say that an affirmance of the decision below will render

disputes over job security insoluble. The parties to the collective bargaining agreement always have the option to reach an understanding on the issue, but what is required, at a minimum, is that the solution adopted must not violate shipping laws intended by Congress to protect those engaged in our import-export trade.

Steamship lines and the ILA are not the only entities subject to multiple federal regulation. If the carriers and the union disapprove of this "unduly onerous regime" (Pet. at 14) of federal regulation, their recourse should be to the legislative branch. The veiled threat in the petition that the union will strike to undo a judicial decision forcefully highlights the urgent need,

deeply felt in PMA, Boston Shipping, and the decision below, to guarantee the FMC's continued jurisdiction over carrier practices destructive to vital segments of our ocean commerce.

III

THERE IS NO INTER-CIRCUIT CONFLICT

The two cases cited by petitioners, Intercontinental Container Transport Corp. v. New York Shipping Association ("ICTC"), 426 F. 2d 884 (2d Cir. 1970) and Consolidated Express, Inc. v. New York Shipping Association, ("Conex"), 602 F. 2d 494(3d Cir. 1979), vacated and remanded, 448 U. S. 901 (1980), both dealt with the labor exemption from the antitrust laws. This Court pointed out in PMA that:

"because the ultimate issue in

> cases such as this is the accommodation of the Shipping Act and the labor laws, rather than the labor laws and the anti-trust laws ... the exemption for collective-bargaining contracts from Shipping Act requirements is not always exactly congruent with the so-called labor exemption from the antitrust laws as understood by the courts." PMA 435 U.S. at 63.

The court of appeals was fully aware of the Second Circuit's decision in ICTC but distinguished the case from the present proceeding under the shipping laws. (App. A at 38a-39a, n. 136). For the same reasons, while the issue in Conex bears some resemblance to those at issue here, the findings in Conex are not dispositive of the shipping law questions raised in this proceeding. The court of appeals, therefore, correctly invoked this Court's

directives in PMA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
June 30, 1982

Respectfully submitted,

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No. 81-2196

IN THE
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OCTOBER TERM, 1981

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS AND NEW YORK SHIPPING ASSOCIATION, INC.,
Petitioners,

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC., NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, CONSOLIDATED FORWARDERS INTERMODAL CORPORATION, AMERICAN IMPORTERS ASSOCIATION AND INTERNATIONAL ASSOCIATION OF NVOCCS,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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RESPONDENT INTERNATIONAL ASSOCIATION OF NVOCCs' OPPOSITION TO PETITION FOR A WRIT

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QUESTIONS PRESENTED

This case presents no novel or significant questions for adjudication by this Court, but rather presents only questions which have been addressed, analogously, by this Court, and which the court below has answered in accordance with this Court's resolution of those analogous questions.

The questions presented are:

1. Whether tariff provisions of an ocean carrier, conceded to be in violation of federal shipping law, are automatically entitled to a nonstatutory labor exemption from federal shipping law merely because the tariff provisions repeat verbatim, or otherwise implement, provisions in a collective bargaining agreement?

2. Whether it is proper, in determining the question of nonstatutory labor exemption under federal shipping law, to consider the effects of tariff provisions implementing collective bargaining terms on entities outside the bargaining group?

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IN THE

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONDENT INTERNATIONAL ASSOCIATION OF NVOCCs' OPPOSITION TO PETITION FOR A WRIT

Respondent International Association of NVOCCs respectfully requests this Court to deny the Petition for a Writ of Certiorari seeking review of the judgment entered in this case on March 2, 1982 by the United States Court of Appeals for the District of Columbia.

STATEMENT OF THE CASE

This case is another one in a long line of attempts, by vessel operators and the union representing their employees, to misplace the burden of the results of technological change in the ocean transportation industry on one small segment [1] of this industry who service small shippers, without the slightest evidence anywhere that this small segment caused any part of the results of the technological change. The instrument chosen by the employers and the union was a set of rules, the 50 mile container rules, that were on their face, and as implemented, unjustly discriminatory and in violation of several sections of the Shipping Act, 1916 as amended [2] (the Act) and the Intercoastal Shipping Act, 1933 as amended, [3] as found by the Federal Maritime Commission. [4]

In finding violations of the several sections of the shipping laws, the Commission also determined that the 50 mile container rules were not entitled to the nonstatutory labor exemption. The court below affirmed the Commission's jurisdiction over the rules and the Commission's denial of the nonstatutory labor exemption. [5] The court below, however, (Judge MacKinnon dissenting) [6] remanded the case to the Commission for an "opportunity to reconsider its previous determination in light of "two

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[1] The Rules on Containers are primarily directed against NVOCCs (non-vessel operating common carriers) who consolidate less-than-containerload (LCL) shipments for shippers who do not have enough cargo to fill a container. App. C, 94a, 95a; App. A, 6a, 7a.

[2] 46 U.S.C. § 812 Fourth, 815 First, 817(a)

[3] 46 U.S.C.S. 845(a)

[4] App. B, 48a, *et seq.*

[5] App. A.

[6] App. A, 40a.

Supreme Court decisions, *FMC* v. *Pacific Maritime Association* 435 U.S. 40 (1978) *(PMA)* and *NLRB* v. *International Longshoremen's Assn.*, 447 U.S. 490 (1980) *(ILA)*. The Commission filed its Report and Order on Remand on May 19, 1982 without substantive change in the Commission's earlier determination. The Commission Report and Order on Remand is pending before the court below on cross motions for summary disposition.

REASONS WHY THE WRIT SHOULD BE DENIED

1. This Court Has Already Determined That Collective Bargaining Agreements Are Not Exempt From Shipping Laws

Petitioners seek to have reviewed the question whether national labor and shipping policies require that tariff provisions of ocean carriers subject to federal shipping laws be automatically entitled to a nonstatutory labor exemption from shipping law merely because the tariff provisions incorporate or implement provisions of a collective bargaining agreement.

This Court held in *PMA* that national labor policy does not require exempting collective bargaining agreements from the filing and approval requirements of Section 15 of the Shipping Act. Clearly, since this Court has granted no automatic labor exemption from the shipping laws for collective bargaining agreements themselves, there is even less rationalization for granting an automatic labor exemption for carrier tariffs implementing such agreements.

This Court further held in *PMA* the Commission acted properly in determining the basis on which it would recognize a labor exemption and this Court cited with approval the criteria defined by the Commission in *United Stevedoring Corp.* v. *Boston Shipping Ass'n.*, 16 FMC 7 (1982) *(Boston Shipping)*

One of the criteria, that the collective bargaining agreement not impose terms on entities outside of the collective bargaining group, is clearly a factor here as in *PMA*. The court below compared the imposition of terms by shipping employers on third parties in *PMA* with the imposition of terms here on NVOCC consolidators and other shipping customers of ocean carrier employers. The Court cited the burdens the Rules imposed on NVOCC consolidators, contrasted these burdens with the free movement of containers across the piers without ILA rehandling (i.e. stripping and restuffing containers) whereby small shippers could then, as the Court stated,

> take full advantage of the benefits of container shipping. In contrast the stuffing and stripping requirements allegedly increase shipping delays and labor costs, augment the risk of loss, pilferage, and damage in transit due to improper storage and deprive the shippers of the special services provided by consolidators. (App. A, 14a)
>
> . . . the Rules have direct and probable effects on shippers' interests and on competition in the shipping industry, . . . The Record fully documents the impact that enforcement of the Rules would have on importers, exporters, consolidators, distributors and others who transport goods by sea. Consolidators are competitors as well as customers of the steamship lines, offering alternative arrangements for ocean transportation of smaller shipments. Those consolidating companies which previously operated within the 50 miles zone are deprived of business under the Rules . . . (App. A37a, 38a). NVOs and distributors previously operating within the 50 miles zone have been severely affected and in some cases have been forced to cease operations. (App. A, 14a).

Thus, in its denial of a labor exemption the Commission had taken account of the imposition of terms, as well as the serious and pervading effects of the Rules, on parties

outside of the bargaining group. The Court below correctly affirmed the Commission's finding that the Rules do not satisfy the *Boston Shipping* criteria. (App. A, 35a).

2. There Is No Conflict With Decisions Of Other Courts

Petitioners cite the decisions in two antitrust cases [7] in support of their contention that the shipping law decision by the court below conflicts with those other circuits.

There is no conflict. The court below succinctly gave the answer to Petitioners in its citation of this Court's holding in *PMA*, thus

> The Supreme Court has recognized that, although antitrust law precedents served as a model, they do not control the scope of the shipping law exemption for labor agreements:
>
> [S]ince the Shipping Act contains its own standards for exempting and for approving and disapproving agreements between carriers, and because the ultimate issue in cases such as this is the accommodation of the Shipping Act and the labor laws, rather than the labor laws and the antitrust laws, it will not necessarily be a misapplicaton of the statutes if the exemption for collective-bargaining contracts from Shipping Act requirements is not always exactly congruent with the so-called labor exemption from the antitrust laws as understood by the courts.
>
> *FMC* v. *Pacific Maritime Ass'n*, *supra* note 84, 435 U.S. at 63. (App. A, 30a)

Without belaboring the point, *PMA* clearly establishes, as the court below pointed out, exempting the

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[7] *Intercontinental Container Transport Corp.* v. *NYSA*, 426 F.2d 884 (2nd Cir. 1970) *(ICTC) Consolidated Express, Inc.* v. *NYSA*, 602 F.2d 494 (3rd Cir. 1979) *vacated and remanded*, 448 U.S. 901 (1980) (Conex)

Rules from antitrust statutes, as in *ICTC*, does not mean they must be exempt from shipping laws. (App. A, 39a)

Further, contrary to Petitioners' misleading contentions there is no irreconcilable conflict in the Third Circuit's decision in *Conex*. The Court there neither granted an automatic labor exemption from antitrust laws for the Rules, nor automatically denied the exemption, but rather held that a determination of the availability of the exemption must be made in the first instance in the district court.

The alleged conflict with *ICTC* and *Conex* is neither "real" nor "perduring" (Pet. Br. p. 12)

CONCLUSION

The court below correctly affirmed the Commission's jurisdiction over the Rules and the Commission's denial of a labor exemption under the shipping laws and therefore, for all of the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: June 30, 1982

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 81-2196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS AND NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC., NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, CONSOLIDATED FORWARDERS INTERMODAL CORPORATION, AMERICAN IMPORTERS ASSOCIATION AND INTERNATIONAL ASSOCIATION OF NVOCCS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF

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COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS AND NEW YORK SHIPPING ASSOCIATION, INC.,

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FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC., NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, CONSOLIDATED FORWARDERS INTERMODAL CORPORATION, AMERICAN IMPORTERS ASSOCIATION AND INTERNATIONAL ASSOCIATION OF NVOCCS,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF

Petitioners, pursuant to Rule 22.5 of the Rules of this Court, submit this reply brief in support of their petition for a writ of certiorari.

The brief in opposition filed by the federal respondents (hereinafter "FRB")[1] does not dispute petitioners' show-

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[1] The briefs in opposition filed by the private respondents are devoted principally to the merits and not to the propriety of review by this Court. Those portions of their briefs which do address the question of certiorari merely repeat arguments raised by the federal respondents.

ing that this case presents substantial questions of federal law of national scope and importance. The main thrust of this opposing brief is a claim of prematurity.[2] This claim is no longer tenable. It has been vitiated by a subsequent order of the court of appeals in this case.[3]

The court of appeals does not share the federal respondents' view that this Court's consideration of the jurisdictional questions presented for review would be premature. On the contrary, the court of appeals has recognized that determination of the substantive issues should await final disposition of the jurisdictional questions. On July 2, 1982, the court of appeals vacated the Federal Maritime Commission's decision on remand, which reaffirmed the Commission's original determination on the merits, and directed the Commission to "defer further action . . . until the Supreme Court has concluded its action in this case." Appendix at 2a. Thus, the federal respondents' contention that "the proceedings on remand have concluded and the case is now pending in the court of appeals for decision on the merits" (FRB at 8) is simply untrue. In light of its latest order, it would seem that the court of appeals agrees that the important jurisdictional questions presented here are ripe for determination by this Court.

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[2] The alternative ground of opposition rests upon an attempt to skirt the intercircuit conflicts by compartmentalizing the statutory schemes addressed in the divergent decisions (FRB at 9-11). Respondents, however, fail to come to grips with the fact that the judicial disagreement relates to a test common to all. In any event, the lengths to which respondents must go to tease apart the overlapping congressional regimes only serves to highlight the need for resolution by this Court of the important and complex questions presented.

[3] A copy of this order is reproduced in the appendix which is attached hereto.

Conclusion

For the foregoing reasons and those set forth in the petition, a writ of certiorari should issue.

Dated: New York, New York
July 23, 1982

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Supplemental Opinion Following Remand

By Direction of the Sitting Division of the Court this *Per Curiam* will not be printed or published in U.S. App. D.C. or F.2d

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1776

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS and NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents,

NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC., *et al.*, INTERNATIONAL ASSOCIATION OF NVOCCS, and AMERICAN IMPORTERS ASSOCIATION, INC.,

Intervenors.

Supplemental Opinion Following Remand

Filed July 2, 1982

Before WRIGHT, MACKINNON, and WALD, *Circuit Judges.*

Opinon for the Court *per curiam.*

PER CURIAM: On March 2, 1982 this court held that the Federal Maritime Commission had jurisdiction under the federal shipping laws to consider the legality of tariff

provisions adopted by the Puerto Rico Maritime Shipping Authority which implemented the collectively-bargained Rules on Containers. We also remanded the record to the Commission for reconsideration of its decision that the Rules on Containers violated various provisions of the shipping laws. A petition for certiorari was filed with the Supreme Court on May 29, 1982 (No. 81-2196). On May 27, 1982 the Commission filed a Report and Order on Remand, reaffirming its previous determination on the merits and ordering discontinuation of the proceedings under review in this case, FMC Dockets Nos. 73-17 and 74-40.

It appears that the Commission is now engaged in a "broad scale proceeding examining the lawfulness of practices of numerous carriers including PRMSA arising out of the '50-mile rules' contained in the present (1980) collective bargaining agreements." Report and Order on Remand at 13 (describing FMC Docket No. 81-11). The Commission has referred that proceeding to an Administrative Law Judge for detailed fact-finding based on a full evidentiary record.

Because the information developed in that investigation may shed further light on the shipping law issues involved in Commission Dockets Nos. 73-17 and 74-40, and because action by the Supreme Court might affect the Commission's jurisdiction over these cases, we vacate the Commission's order that these proceedings be discontinued. The Commission should defer further action in its Dockets Nos. 73-17 and 74-40 until it has reached its final decision in its Docket No. 81-11 and until the Supreme Court has concluded its action in this case. The Commission should then reconsider its conclusions in Dockets Nos. 73-17 and 74-40.

So ordered.